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No. 93-1197

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In The

Supreme Court of the United States

October Term, 1993

ALBERT HESS,

Petitioner,

vs.

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Respondent.

CHARLES F. WALSH,

Petitioner,

vs.

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May Respondent, Port Authority Trans-Hudson Corporation (PATH), an entity created by an interstate compact, defeat an injured railroad employee's right to bring an action, under the Federal Employers' Liability Act, in a federal district court, by asserting immunity from federal court suit under the Eleventh Amendment to the United States Constitution, a defense allowed PATH by the United States Court of Appeals for the Third Circuit, in direct conflict with the United States Court of Appeals for the Second Circuit, even though no judgment against PATH will impact the state treasury of either of the compacting states and even though the statutory structure of PATH indicates that it is not the arm of either of the compacting states?

2. Should Port Authority Trans-Hudson Corporation (PATH), an entity created by an interstate compact, be able to defeat an injured railroad employee's right to bring an action, under the Federal Employers' Liability Act, in a federal district court, by asserting immunity from federal court suit under the Eleventh Amendment to the United States Constitution, even though the action is brought against an interstate compact entity pursuant, to the district court's federal question jurisdiction by citizens of its own state?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Albert Hess and Charles F. Walsh, respectfully petition for a writ of certiorari to review judgments of the United States Court of Appeals for the Third Circuit in the above-captioned consolidated cases.

OPINIONS BELOW

The opinion of the Third Circuit Court of Appeals in *Albert Hess v. Port Authority Trans-Hudson Corporation*, consolidated with, *Charles F. Walsh v. Port Authority Trans-Hudson Corporation*, (App., *infra*, 1a-2a), consists solely of a Judgment Order summarily affirming, without comment or analysis, the opinions rendered by the United States District Court for the District of New Jersey. The Court of Appeals' decision is reported at the table in 8 F.3d 811 (3d Cir. 1993). The District Court opinion in *Hess* (App. C, 5a-33a) is reported at 809 F.Supp. 1172 (D.N.J. 1992). The District Court opinion in *Walsh* (App. E, 35a-41a) is reported at 813 F. Supp. 1095 (D.N.J. 1993).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals, in the consolidated cases, was entered on September 30, 1993. (App. A, 1a-2a). A petition for rehearing and rehearing en banc was denied on October 27, 1993. (App. F, 42a-43a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Federal Employers' Liability Act, provides for the jurisdiction of federal district courts at 45 U.S.C. § 56, which reads:

> No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.
>
> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

Additionally, portions of the Compact and subsequently enacted bi-state legislation is found at N.Y. Unconsol. L. §§ 6101 *et seq.* and N.J.S.A. §§ 32:1-1 *et seq.* The New York statutes are identical to the New Jersey statutes. Only the New York statutes are reproduced at App. G, 45a-58a.

STATEMENT OF THE CASE

The Petitioners, Albert Hess (a New Jersey citizen) and Charles F. Walsh (a New York citizen), were employees of Port Authority Trans-Hudson Corporation (PATH) at the time of their respective accidents. Mr. Hess was a locomotive engineer. On June 29, 1987 he sustained injuries when the train's window malfunctioned and struck his right hand. Mr. Walsh was a railroad conductor. On October 6, 1986 he was injured when a passenger train door malfunctioned and slammed into his right wrist and arm. Each employee sustained personal injuries because of the malfunctioning railroad equipment.

PATH is an interstate railroad operating trains between the states of New York and New Jersey. PATH is a wholly owned subsidiary of the Port Authority of New York and New Jersey. The Port Authority, and thus PATH, are entities created by an interstate compact between the states of New York and New Jersey and consented to by the United States Congress. *See Port Authority Trans-Hudson Corporation v. Feeney*, 495 U.S. 299, 300-301 (1990)(cited as *Feeney*).

Because Mr. Hess and Mr. Walsh were employed by an interstate railroad at the time of their injuries, and further, because they alleged that their respective injuries were caused by, *inter alia*, the negligence of PATH, their railroad employer, they filed actions pursuant to the Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq*. The Hess Complaint was filed on May 31, 1990. The Walsh Complaint was filed on May 9, 1989. Both complaints were filed within the three-year statute of limitations established by 45 U.S.C. § 56. Both complaints were filed more than one year after the respective accidents.

PATH filed Motions to Dismiss in the District Court. The Motions raised an Eleventh Amendment immunity defense from suit in federal court. The Motions asserted non-compliance with an alleged condition precedent to suit in federal court, N.Y. Unconsol. Laws § 7107 (N.J.S.A. § 32:1-163), that provides:

> The foregoing consent to suit is granted upon the condition that any suit, action or proceeding prosecuted or maintained under this act shall be commenced within one year after the cause of action therefore shall have accrued. . .

Therefore, although the complaints were filed within the three-year statute of limitations established by the FELA, PATH

asserted that suit in federal court must be filed within one year after an accident.

The District Court in *Hess* assumed that PATH was an entity entitled to assert Eleventh Amendment immunity. It relied on the Third Circuit's opinion in *Port Authority Police Benevolent Association, Inc. v. Port Authority Trans-Hudson Corporation* (hereinafter cited as *PBA).*, 819 F.2d 413 (3d Cir.), *cert. denied*, 484 U.S. 953 (1987), and other opinions, to find that PATH was entitled to Eleventh Amendment immunity. (15a-16a). The District Court in *Walsh* also relied on *PBA* in holding that PATH was entitled to assert Eleventh Amendment immunity. (37a). Each District Court also held that N.Y. Unconsol. Laws § 7107 (N.J.S.A. § 32:1-163) placed a restriction upon PATH's waiver of Eleventh Amendment protection found by this Court in *Feeney* and that the waiver was only effective if suit was brought within one year of the accident. Because, in each case, suit was brought more than one year after the accidents, each case was dismissed. (App. B, 3a-4a and App. D, 34a).

The Third Circuit panel affirmed, without comment or analysis, both District Court dismissals. The Third Circuit refused rehearing or en banc consideration of the issues. (App. F, 42a-43a). At oral argument, and in the Petition for Rehearing, the Third Circuit was advised that its decision was in direct conflict with decisions of the United States Court of Appeals for the Second Circuit. *See Feeney v. Port Authority Trans-Hudson Corp.*, 873 F.2d 628 (2d Cir. 1989), *aff'd, Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990). The Third Circuit was aware of this conflict, as it was the subject of this Court's review in *Feeney*. Because the three-year statute of limitations has run in each case, the Petitioners are left without a remedy unless the Court grants this Petition.

REASONS FOR GRANTING THE WRIT

I.

THERE IS A DIRECT CONFLICT BETWEEN THE THIRD CIRCUIT BELOW AND THE SECOND CIRCUIT ON THE ISSUE OF WHETHER PATH IS ENTITLED TO ASSERT AN ELEVENTH AMENDMENT DEFENSE FROM SUIT IN FEDERAL COURT.

This Court has previously recognized that an irreconcilable conflict exists, between the Courts of Appeals for the Third and the Second Circuits, on the issue of whether PATH is an entity entitled to assert Eleventh Amendment immunity from suit in federal court. In *Port Authority Trans-Hudson Corporation v. Feeney*, 495 U.S. 299 (1990), the Petition for Certiorari raised two questions. The first was identical in substance to the first question in this Petition: Is PATH entitled to assert an Eleventh Amendment defense from suit in federal court? The second issue was whether PATH had waived its Eleventh Amendment protection. Certiorari to the Second Circuit was granted. In *Feeney*, this Court observed that the Second Circuit had held that PATH was not an Eleventh Amendment entity, and therefore, that it could not assert immunity from suit in federal court. The Third Circuit, viewing PATH totally differently, held that PATH was an Eleventh Amendment entity that could assert immunity from suit in federal courts. The Second and Third Circuits also disagreed on whether PATH had waived any Eleventh Amendment immunity that it may have had. The Second Circuit ruled that it had waived immunity; the Third Circuit held that it had not. *Feeney* at 300-304. This Court did not address the first question, whether PATH was the kind of entity entitled to assert Eleventh Amendment immunity, because this Court found that the states had consented to suit in federal court. *Id.* at 305. The conflict on the first question remains unresolved.

Now, this issue again raises its ugly head. Injured railroad employees who file their FELA lawsuits in Second Circuit courts are treated differently than employees who file their lawsuits, against the same railroad, in Third Circuit courts. Employees of the same railroad, possibly even members of the same crew who were involved in the same accident, are treated differently. For example, if two crew members, injured in the same accident, file their lawsuits in different courts, the employee filing his Complaint in a Second Circuit court may do so any time before the three-year statute of limitations established by the FELA, 45 U.S.C. § 56. The employee, filing in a Third Circuit court, will have his case dismissed unless it is filed within one year of the accident. This conflict between the Third and Second Circuits, results in the same federal law being applied differently to similarly situated employees, solely because of the district court that they chose as their forum. This conflict effectively reduces the federally mandated statute of limitations, if an employee chooses to file his Complaint in federal court in the Third Circuit, but not in the Second Circuit. These conflicting decisions, on whether PATH is entitled to assert Eleventh Amendment immunity from suit in federal court, create a situation of confusion and an irrational disparate treatment of similarly situated injured employees.

This confusion and disparate treatment is particularly troublesome because it involves significant areas of constitutional and federal law. Constitutionally, two Circuits apply the Eleventh Amendment to the United States Constitution in opposite ways to the same railroad, where all factors are the same except the forum where suit is brought. Further, this non-symmetrical application of the law, by the Third and Second Circuits, takes place in the context of FELA cases. This Court has consistently held that uniform interpretation is a goal of the FELA and is a necessity. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 244 (1942); *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359, 361 (1952). "When a

federal law is the source of the plaintiff's claim,[1] there is a federal interest in defining the defenses to that claim, including the defense of immunity." *Ferri v. Ackerman*, 444 U.S. 193, n. 13 (1979), citing, *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). Such a federal interest is present in the instant cases.

The question, whether PATH is entitled to assert Eleventh Amendment immunity, has not yet been settled. It is an important question because of the confusion and disparate treatment caused by the conflict between the Third and Second Circuits. It is an important question because of the lack of uniformity it places into FELA law. Petitioners respectfully submit that this confusion and disparate treatment can only be eliminated by a decision of this Court.

A. The Third Circuit's Decision That PATH Is An Entity Entitled To Assert Eleventh Amendment Immunity Is Contrary To, And In Conflict With, Decisions Of This Court. The Second Circuit's Decision Concerning PATH Is In Accord With Decisions Of This Court. This Conflict Is A Result Of The Third Circuit's Faulty Interpretation Of PATH's Enabling Compact.

This Court has held that an interstate compact entity is not

1. The claims of the Petitioners, in the District Courts, arose from federal law. As employees of an interstate railroad each had the right to sue his employer, PATH, to recover money damages for personal injuries sustained as a result of PATH's negligence or faulty equipment. Section 56 of Title 45, U.S.C. (A45), further gave the Petitioners the right to choose as their forum either a federal court or a state court. Section 56, enacted as Section 6 of Public Law 117 (1910), 36 Stat. 291, specifically expanded the federal courts where an injured employee could bring his FELA action. This was enacted because Congress felt that the original Act was "too restrictive" of the right of the employee to choose the federal court in which to bring suit. *H.R. Report 613, accompanying H.R. 1639, from the Committee on Judiciary*, June 19, 1947, p. 2.

entitled to Eleventh Amendment immunity from suit in federal court simply by virtue of the fact that it was created by two states. In *Lake Country*, where this Court analyzed an interstate compact entity created by the states of California and Nevada,[2] this Court held,

> By its terms, the protection afforded by the Amendment is only available to 'one of the United States.' It is true, of course, that some agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself. But the Court has consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a 'slice of state power.'
>
> If an interstate compact discloses that the compacting States created an agency comparable to a county or municipality, which has no Eleventh Amendment immunity, the Amendment should not be construed to immunize such an entity. Unless there is good reason to believe that the States structured the new agency to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose, there would appear to be no justification for reading

2. The Tahoe Regional Planning Agency (TRPA).

> additional meaning into the limited language of the Amendment.

Id. at 401.

This Court's conclusion in *Lake Country*, that the Amendment should be applied to interstate compact entities only where it is necessary "to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself," *Id.*; *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, n. 34 (1984), *citing, Lake Country*, is consistent with its other decisions. *See Edelman v. Jordan*, 415 U.S. 651, 663, 668 (1974)("Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."); *Ford Motor Co. v. Department of Treasury of State of Indiana*, 323 U.S. 459, 464 (1945)("...when the action is in essence one for the recovery of money against the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit . . .").

The Third Circuit has not followed these decisions. Instead, it has permitted PATH to assert an Eleventh Amendment defense, even though any judgment against PATH will not, and cannot, be paid from the treasuries of either New York or New Jersey.

The District Courts, in the cases of these two Petitioners, relied on the Third Circuit decision in *PBA*. *PBA* held that PATH was entitled to assert Eleventh Amendment immunity from suit in federal court. The Third Circuit Court of Appeals, in the *Hess* and *Walsh* cases, ratified the District Courts' reliance on *PBA* by its summary affirmance of the District Courts' dismissal of the two FELA actions.

The Third Circuit, in *PBA*, reached an incorrect result and one that is in conflict with decisions of this Court and in direct conflict with the Second Circuit, *Feeney v. Port Authority Trans-Hudson Corp.*, 873 F.2d 628 (2d Cir. 1989), *aff'd, Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990), because it did not fully or properly read the Compact creating PATH.

In *PBA*, the Third Circuit addressed the impact on the state treasury and held,

> Indirectly, then, a judgment against the Authority could have some impact on the state treasury. Although the fiscal health presently enjoyed by the Port Authority renders this conclusion purely theoretical, Compact Article XV nevertheless makes the states' intentions towards the Authority crystal clear: if the Authority is ever in need of financial support, the states will be there to provide it.

Id. at 416.

The Third Circuit, in *PBA*, cited Compact Article XV as follows:

> Unless . . . the revenues from operations are adequate to meet all expenditures, the legislatures of the two states shall be appropriate [the amounts needed].

Id. at 416.

The Third Circuit's error was not fully quoting the statutory provision. The quotation, as it appears in *PBA*, is misleading. Because the Third Circuit relied on an incorrect

statement of the statute, its conclusion, based on that incorrect statement, was wrong and contrary to the decisions of this Court and the Second Circuit.

Compact Article XV *actually reads* as follows:

> Unless and until the revenues from operations conducted by the port authority are adequate to meet all expenditures, the legislature of the two states shall appropriate, in equal amounts, annually, for the salaries, office and other administrative expenses, such sum or sums as shall be recommended by the port authority *and approved by the governors of the two states*, but each state obligates itself hereunder only to the extent of one hundred thousand dollars in any one year.

(Emphasis added) (Uncon. Laws of N.Y. § 6416) (48a).

Contrary to the Third Circuit's statement in *PBA*, there is no obligation for either state to make appropriations from their treasuries to make up a cash shortfall caused by any judgment rendered against PATH. The treasuries of either state can only be reached by the *voluntary* actions of the states. If the Governors of both states do not approve appropriations, and they are not required to approve them, the states are not obligated to make appropriations to PATH. Voluntary payments, by a state to meet shortfalls caused by judgments against an agency, do not trigger sovereign immunity. *Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655, 661 (en banc)(3d Cir 1989), *cert. denied*, 493 U.S. 850 (1989).

Thus, on the critical issue of whether a judgment liability must be paid from public funds in the state treasury, the Third Circuit in

PBA was in error. This error was repeated by the Third Circuit in the cases now before the Court in this Petition. If this error is not corrected by this Court, the Third Circuit will continue to apply the Eleventh Amendment contrary to decisions of this Court, and in conflict with the Second Circuit. It will perpetuate a lack of uniformity in FELA cases.

The Second Circuit, in finding that PATH was not an entity entitled to assert Eleventh Amendment immunity, properly interpreted the statute and held,

> In cases where doubt has existed as to the availability of Eleventh Amendment immunity, the Supreme Court has emphasized the exposure of the state treasury as a critical factor. In *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662, *reh'g. denied*, 416 U.S. 1000, 94 S.Ct. 2414, 40 L.Ed.2d 777 (1974), for example, the Supreme Court stated that "[i]t is ... well established that even though a State is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment.... [T]he rule [that] has evolved [is] that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." Id. 415 U.S. at 663, 94 S.Ct. at 1355 (citations omitted); *see also Lake Country*, 440 U.S. at 400-01, 99 S.Ct. at 1176-77.
>
> We believe it clear that a judgment against PATH would not be enforceable against either New York or New Jersey. The Port Authority is explicitly barred from pledging the credit of

either state or from borrowing money in any name but its own. Even the provision for the appropriation of moneys for administrative expenses up to $100,000 per year requires prior approval by the governor of each state and an actual appropriation before obligations for such expenses may be incurred. Moreover, the phrase "salaries, office and other administrative expenses" clearly limits this essentially optional obligation of the two states to a very narrow category of expenses and thus also evidences an intent to insulate the states' treasuries from the vast bulk of the Port Authority's operating and capital expenses, including personal injury judgments. No provision commits the treasuries of the two states to satisfy judgments against the Port Authority, therefore. We believe that this insulation of state treasuries from the liabilities of the Port Authority outweighs both the methods of appointment and gubernatorial veto so far as the Eleventh Amendment immunity is concerned.

We realize that our holding creates a conflict between ourselves and the Third Circuit regarding PATH, see *Port Authority Police Benevolent Ass'n., Inc. v. Port Authority of New York and New Jersey*, 819 F.2d 413 (3d Cir.), *cert. denied*, __ U.S. __, 108 S.Ct. 344, 98 L.Ed.2d 370 (1987), that can be resolved only by the *632 Supreme Court. That decision, however, was based on the Third Circuit's understanding that in the event that "a judgment were entered against the Authority

that was serious enough to deplete its resources, the Authority would be able to go to the state legislatures in order to recoup the amount needed for its operating expenses." *Port Authority Police Benevolent Ass'n.*, 819 F.2d at 416. To the extent that this statement implies that the states must make such an appropriation, it appears to be in error. Under the compact, states are obligated to provide funds for Port Authority administrative expenses up to $100,000 only if their respective governors approve the request. Judgments in the present action thus cannot lead to a depletion of state treasuries without gubernatorial consent.

Feeney (2d Cir.) at 631-632.

Four members of this Court, in *Feeney (S.Ct.)* at 316-318 (Justices Brennan, Marshall, Blackmun and Stevens, concurring), agreed that the Second Circuit was correct, and thus that the Third Circuit was in error, and those Justices would have also found that PATH is *not* an entity entitled to assert Eleventh Amendment immunity. It is respectfully submitted that the entire Court should now resolve this serious conflict between the Third and Second Circuits.

B. The Third Circuit's Decision That PATH Is An Entity Entitled To Assert Eleventh Amendment Immunity Is Contrary To, And In Conflict With, Decisions Of This Court. PATH Is Not The Type Of Entity Entitled To Assert Eleventh Amendment Immunity From Suit In Federal Court.

This Court recognized, in *Lake Country*, that the purpose of extending the Eleventh Amendment immunity to a state associated entity is "to protect the state treasury from liability that would have

had essentially the same practical consequences as a judgment against the State itself," *Lake Country* at 401; *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, n. 34 (1984), *citing, Lake Country.* When the fiscal character of Port Authority of New York and New Jersey (and its fully owned subsidiary, PATH) is analyzed, it becomes evident that PATH is not an agency of either New York or New Jersey, and is not entitled to any Eleventh Amendment protection. An analysis of PATH's fiscal structure confirms that the Third Circuit's decisions in *PBA* and in these cases are incorrect and that PATH, as the conflicting decision in the Second Circuit[3] holds, is not entitled to Eleventh Amendment immunity.

PATH's money does not predominantly come from the states. As the Port Authority has stated,

> The Compact envisions the Port Authority as being financially self-sustaining and, as such, it must raise the funds necessary for the construction and acquisition of facilities upon the basis of its own credit.

(60a).

The Port Authority Comprehensive Financial Report (App. H, 59a-63a). reports an increase in gross operating revenues and states that this is "primarily attributable to the effort of" toll increases and higher flight fees. (60a-61a). At another portion, the Port Authority reports,

> The costs of providing facilities and services to the general public on a continuous basis are

3. *Feeney (2d Cir.).*

> recovered primarily in the form of tolls, fares, fees, rentals and other user charges.

(62a).

The Report also documents,

> The Port Authority finances construction and acquisitions of the facilities primarily by issuing bonds, notes and other obligations and through application of its reserve fund.

(63a).

Additionally, the Port Authority reports funding through its portfolio management. There is reported $47,000,000.00 of earnings on long-term investments and $27,649,000 of earnings on short-term investments. (61a).

See also, Unconsolidated Laws of New York, § 6459 (49a) (reference to authority of Port Authority to issue bond and securities); § 7053 (55a-57a) (authorizing Port Authority to issue bonds as the general obligations of the Port Authority); § 7002 (54a-55a) (establishing a general reserve fund to place surplus revenues to be used to pledge as security or to be used for its undertakings).

The Port Authority is, as the Compact envisions, "financially self-sustaining." (60a). Its money does not come from the states and, therefore, it is not entitled to any Eleventh Amendment immunity.

Equally, if not more important than the fact that the Port Authority's money does not come from any state, is the nature of the states' obligation to PATH. The States of New York and New

Jersey do not appropriate money for the Port Authority. Further, and of vital import, a judgment against Port Authority/PATH *will not* impact on the treasury of either state. Article VII of the Bi-State Compact (N.Y. Uncon. Laws § 6408) (47a) clearly commands:

> The Port Authority *shall not* pledge the credit of either state except by and with the authority of the legislature thereof.

(Emphasis added).

The Comprehensive Financial Report states,

> The agency neither has the power to pledge the credit of either state or any municipality . . .

(60a).

See also, N.Y. Uncon. Laws § 6459 (49a-50a) (" . . . it shall have no power to pledge the credit of either state or to impose any obligation upon either state or municipality . . ."); § 7053 (55a-57a) ("bonds . . . shall be direct and general obligations of the Port Authority, and its full faith and credit shall be pledged for the prompt payment of the principal and interest thereof").

Any appropriation by either New York or New Jersey, in response to a judgment against Port Authority/PATH, is solely discretionary. That does not trigger Eleventh Amendment immunity. As in *Lake Country*, a judgment against Port Authority/PATH is not enforceable against any state.

Further evidence that a judgment against PATH is not a judgment against either of the compacting states is the existence of insurance. In a section titled, "Risk Management," it reports that the Port Authority carries both ordinary insurance and excess

public liability insurance. Further, it "provides for uninsured potential losses through its self-insurance program by appropriation from the Consolidated Bond Reserve Fund to the Operating Fund and by charging operating expenses as incurred." (62a).

Accordingly, as the Second Circuit and four Justices of this Court have held, the funding/fiscal elements demonstrate that Port Authority/PATH is not entitled to Eleventh Amendment protection. The Third Circuit's contrary decisions are incorrect. The granting of this Petition is necessary to resolve this conflict and to bring the Third Circuit's decisions in line with the decisions of this Court.

PATH, like the entity reviewed in *Lake Country*, is established as an autonomous entity with significant independent powers. It is, therefore, not entitled to Eleventh Amendment immunity.

The Port Authority, by statute, has a separate corporate existence. The significance of this designation is that only a state is entitled to Eleventh Amendment immunity, and not municipalities and political subdivisions. *Lake Country* at 400-401. The Port Authority/PATH is more akin to a political subdivision than a state. The Port Authority/PATH explicitly characterizes itself as a "political subdivision." (59a). Further, it is established as "body corporate and politic." (Article III of Compact: N.Y. Uncon. Laws § 6404) (45a), constituting a "body, both corporate and politic..." (Art. VI of Compact: N.Y. Uncon. Laws § 6407) (46a-47a). It is also referred to by statute as a "municipal corporate instrumentality of the two states." N.Y. Uncon. Laws § 6459 (49a). In *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), this Court discussed the designation of "bodies politic and corporate." It held that the designation did not include the state, but only private or municipal corporations. *Id.* at 68, n. 9. PATH's own characterization of itself, and the designation as a "body corporate

and politic", is clear proof that the Port Authority/PATH was established to be akin to a political subdivision or municipality, and therefore, is not entitled to Eleventh Amendment immunity.[4]

Other indicia of its autonomy is that the Port Authority/PATH can sue and be sued (N.Y. Uncon. Laws §§ 7101, 6612, 6466) (57a, 51a-54a, 50a-51a); can enter into contracts (N.Y. Uncon. Laws § 6612) (51a-54a) ("all details of the effectuation, including . . . contracts . . ., shall be within its sole discretion . . "); and can purchase, sell or lease land, or own and hold real or personal property (Art. VI of Compact: N.Y. Uncon. Laws §§ 6407, 6951) (46a-47a, 54a).

As was the entity in *Lake Country*, PATH has significant authority to make its own rules and regulations, and to enforce them. Relevant portions of its enabling act are as follows:

> The Port Authority . . . is hereby vested with all necessary and appropriate powers not inconsistent with the Constitution of the United States or of either state, to effectuate the [comprehensive plan], except the power to levy taxes or assessments.

(N.Y. Uncon. Laws § 6459) (49a-50a).

Another provision of its effectuating statute provides:

> All details of the effectuation, including but not limited to details of financing, leasing, rentals,

4. *See also, Commissioner of Internal Revenue v. Shamberg's Estate*, 144 F.2d 998 (2d Cir 1944), *cert. denied*, 323 U.S. 792 (1945) (Found that the Port Authority was a political subdivision under the IRS code permitting its bonds to produce tax free income).

> tolls, fares, fees and other charges, rates, contracts and services . . . shall be within its sole discretion and its decision . . . shall be controlling and conclusive.
>
> So long as any facility constituting a portion of the port development project shall be owned, controlled or operated by the Port Authority (either directly or through a subsidiary corporation . . .), no agency, commission or municipality of either or both of the two states shall have jurisdiction over such facility nor shall [they] have any jurisdiction over the terms or method of effectuation of all or any portion thereof by the Port Authority . . .
>
> Nothing in this act shall be deemed to prevent the Port Authority from establishing, acquiring, owning, leasing, constructing, effectuating, developing, maintaining, operating, rehabilitating or improving all or any portion of the port development project through a wholly owned subsidiary . . .* * * Such subsidiary corporation shall have all of the powers vested in the Port Authority itself . . ., except that it shall not have the power to contract indebtedness.

(N.Y. Uncon. Laws § 6612) (51a-54a).

Besides these sweeping powers, and the prohibition against the interference by any other private or public entity, the Compact provides that the Port Authority commissioners may adopt by-laws for its management (Art. V of Compact: N.Y. Uncon. Laws § 6406) (46a), appoint officers and employees and determine their

qualifications and duties (Art. XIV of Compact: N.Y. Uncon. Laws § 6415) (47a) and can make rules and regulations (subject to state concurrence) (Art. XVIII of Compact: N.Y. Uncon. Laws § 6419) (48a).

Clearly, the Port Authority and PATH have been vested with enormous autonomy and sweeping powers over the 1,500 square miles under its exclusive jurisdiction. It is much more akin to a political subdivision than an arm of the compacting states. This weighs heavily against Eleventh Amendment immunity.

Two other factors relied on by this Court, in *Lake Country*, in concluding that TRPA was not entitled to Eleventh Amendment immunity, compel the conclusion that PATH is not entitled to that immunity. The TRPA was created to regulate and coordinate development in the Lake Tahoe Basin and to conserve its natural resources. The area consists of 500 square miles and that area is under the control and jurisdiction of the TRPA. *Lake Country* at 393-94. The Port Authority was created in 1921 to plan, develop and operate facilities of transportation and commerce in the "Port District," which consists of 1,500 square miles centering about New York Harbor. (A59). In *Lake Country*, this Court said that "the regulation of land is traditionally a function performed by local governments. Concern with the proper performance of that function in the bi-state area was a primary motivation for the creation of TRPA ..." This Court found that that factor supported its conclusion that TRPA was like a political subdivision, and not a state, and therefore, was not entitled to Eleventh Amendment immunity. Similarly, the Port Authority was created to regulate the land in the New York Harbor region. It too is performing a function traditionally performed by local governments and not states. It too is not entitled to Eleventh Amendment immunity.

In *Lake Country*, this Court found that TRPA was not an arm of the states subject to their control. It held that this Court's

conclusion was "*perhaps most forcefully demonstrated* by the fact that California has resorted to litigation in an unsuccessful attempt to impose its will on TRPA." *Id.* at 402 (emphasis added). The same is true in this case. In *People v. The Port of New York Authority*, 64 Misc.2d 563, 315 N.Y.S. 2d 9 (S.Ct. 1970), the State of New York resorted to litigation to seek an injunction to stop the Port Authority from polluting the water. This should forcefully demonstrate that the Port Authority is not an arm of a state and is not subject to its control. PATH is independent of any state and it is not entitled to the Eleventh Amendment immunity afforded only to states.

Thus, the non-fiscal character of PATH also supports the decision of the Second Circuit, and four Justices of this Court, that PATH is not entitled to Eleventh Amendment immunity from suit in federal court. The decisions of the Third Circuit, to the contrary, are in error. The granting of this Petition is necessary to resolve this conflict and to bring the Third Circuit's decisions in line with the decisions of this Court.

II.

THIS COURT SHOULD RE-EXAMINE ITS ELEVENTH AMENDMENT CASES SO THAT IMMUNITY FROM SUIT IN FEDERAL COURT IS NOT EXTENDED TO ENTITIES, AND IN SITUATIONS, NOT INTENDED BY THE FRAMERS OF THE AMENDMENT.

This Court has recognized that additional meaning should not be read into the "limited language of the [Eleventh] Amendment." *Lake Country* at 401. The language of the Eleventh Amendment is quite simple:

> The Judicial power of the United States shall not be construed to extend to any suit in law or

> equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Although, on its face, the Amendment only precludes federal court jurisdiction against a state when sued by citizens of *another* state, this Court has interpreted the Amendment to deny federal jurisdiction in many more situations. This overly expansive interpretation of the Amendment has been consistently challenged by vigorous dissents. *See Edelman* (Brennan, dissenting)(Eleventh Amendment should not bar citizens from suing their own state in federal court); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 247 (1985) (Brennan, Blackmun, Stevens, Marshall, dissenting) (Eleventh Amendment is inapplicable where federal jurisdiction is based upon a federal question); *Feeney (S.Ct.)* at 309 (Brennan, Blackmun, Stevens, Marshall, dissenting) (Interstate agencies are not entitled to Eleventh Amendment immunity).

In the cases presently before this Court, PATH is a citizen of both New York and New Jersey. Mr. Hess is a citizen of New Jersey, while Mr. Walsh is a citizen of New York. Thus, these cases do not involve suits by citizens of another state. Further, PATH is an interstate compact entity. Finally, the Petitioners' claims in the District Courts were brought pursuant to their federal question jurisdiction, to wit, the Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq*.

This Court should grant this Petition to determine whether these dissenting opinions, of Justices Blackmun, Stevens, Marshall and Brennan, actually reflect an accurate interpretation of the Eleventh Amendment. Because it is respectfully submitted that they do, it is also submitted that past interpretations by this Court of the Eleventh Amendment have been, without justification, too expansive. The Eleventh Amendment does not

apply to actions such as these where citizens have sued an interstate compact entity, whether or not that entity is an arm of the state, to enforce a federal right under the District Court's federal question jurisdiction. The granting of this Petition will give this Court an opportunity to re-examine the Eleventh Amendment and make certain that its interpretation is consistent with the intent of its Framers.

CONCLUSION

The Petition for Writ of Certiorari to the United States Court of Appeals to the Third Circuit should be granted.

Respectfully submitted,

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COFFEY & KAYE
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Date: January 24, 1993

APPENDIX A — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED SEPTEMBER 30, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 93-5051 and 93-5149

ALBERT HESS, Appellant in No. 93-5051

CHARLES F. WALSH, Appellant in No. 93-5149

v.

PORT AUTHORITY TRANS-HUDSON CORPORATION (PATH)

On Appeal from the United States District Court
For the District of New Jersey

(D.C. Civil Action Nos. 90-02150 & 89-01991) District Judge: Honorable Alfred J. Lechner, Jr. District Judge: Honorable William G. Bassler

Argued September 22, 1993

BEFORE: STAPLETON, ROTH and LEWIS,
Circuit Judges

JUDGMENT ORDER

After consideration of the contentions raised by appellants it is

ORDERED AND ADJUDGED that the judgments of the district court entered December 23, 1992 and February 8, 1993, be and the same are hereby AFFIRMED.

Appendix A

Costs taxed against appellants.

By the Court,
s/ Walter K. Stapleton
Circuit Judge

ATTEST:
s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

DATED: September 30, 1993

Certified as a true copy and issued in lieu
of a formal mandate on November 4, 1993.

Teste: s/ P. Douglas Sisk
Clerk, U.S. Court of Appeals for the Third Circuit.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED DECEMBER 21, 1992

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 90-2150 (AJL)

ALBERT HESS,

Plaintiff,

v.

PORT AUTHORITY TRANS-HUDSON CORPORATION (PATH),

Defendant.

ORDER

This matter having come before the court by way of the motion of defendant Port Authority Trans-Hudson Corp. (the "Port Authority") to dismiss the complaint (the "Complaint"), filed 31 May 1990, pursuant to Fed. R. Civ. P. 12, and the court having considered the submissions of the parties, and oral argument having been held on 15 December 1992, and for the reasons set forth in a Letter-Opinion filed on this date, and for good cause shown,

IT IS, on this 21st day of December, 1992,

ORDERED, that the Port Authority motion to dismiss is granted; and it is further

Appendix B

ORDERED, that the Complaint is dismissed in its entirety.

s/ Alfred J. Lechner, Jr.
ALFRED J. LECHNER, JR., U.S.D.J.

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED DECEMBER 21, 1992

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

21 December 1992

NOT FOR PUBLICATION

LETTER-OPINION

ORIGINAL FILED WITH THE CLERK OF THE COURT

Patrick Henigan, Esq.
Coffey & Kaye
718 Two Bald Plaza
Bala Cynwyd, Pennsylvania 19004
(Attorney for Plaintiff)

Hugh H. Welsh, Esq.
Donald F. Burke, Esq.
One Riverfront Plaza, Suite 327
Newark, New Jersey 07102
(Attorneys for Defendant)

Re: *Albert Hess v. Port Authority Trans-Hudson Corporation*
Civil Action No. 90-2150 (AJL)

Counsel:

This is a personal injury action brought by plaintiff Albert Hess ("Hess") against defendant Port Authority Trans-Hudson

(the "Port Authority"). Currently before the court is the motion of the Port Authority to dismiss the complaint (the "Complaint"), filed 31 May 1990,[1] for lack of subject matter jurisdiction.[2]

For the reasons set forth below, the motion to dismiss is granted.

Facts

Hess is a citizen and resident of the State of New Jersey. Con.plaint, ¶ 1. Port Authority is an agency of the States of New York and New Jersey, created by an Interstate Compact to which the United States Congress assented. Moving Brief at 1; *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 301 (1990). Port Authority operates various terminal, transportation and other facilities within the statutorily-defined "Port District" of New York and New Jersey, in part through its wholly-owned subsidiary PATH Interstate Railway System ("PATH"). Moving Brief at 1.

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1. In support of the motion to dismiss, the Port Authority has submitted the following: Memorandum of Law on Behalf of Defendant Port Authority Trans-Hudson Corporation in Support of Its Motion to Dismiss (the "Moving Brief"); Memorandum of Law on Behalf of Defendant Port Authority Trans-Hudson Corporation in Reply to Plaintiff's Opposition to PATH's Motion to Dismiss Returnable on December 14, 1992 (the "Reply Brief").

In opposition to the motion to dismiss, Hess has submitted the following: Plaintiff's Response to Defendant's Motion to Dismiss (the "Opp. Brief"). Oral argument was held on 15 December 1992.

2. Although the Port Authority fails to cite the rule of procedure pursuant to which the motion is brought, it appears that such a motion is appropriate under Fed. R. Civ. P. 12(h)(3).

The facts of this lawsuit are not complex. On 29 June 1987, at approximately 6:30 a.m., Hess was injured in the course of his duties while employed by the Port Authority. Complaint, ¶ 10. According to Hess, he was working in the engine of a commuter train proceeding from 33rd Street in New York City to Hoboken, New Jersey when, "the window in said train malfunctioned and struck [Hess'] right hand." *Id.* According to Hess, the accident "was caused by the negligence of [the Port Authority], its agents, servants and/or employees ... and was due in no manner whatsoever to any act or failure to act on the part of [Hess]." *Id.*, ¶¶ 5, 9-11.

Hess claims that, as a result of the accident, he has sustained "soft tissue injury to the right hand; superiostela hematoma of the right hand and injury to the tissues and muscles of the righthand."[3] *Id.*, ¶ 12. Moreover, "[s]ome or all of the above injuries are or may be permanent in nature. The full extent of [Hess'] injuries are not presently known." *Id.* Hess also claims:

> As a reşult of the accident . . . [he] has suffered a loss and impairment of earnings and earning power and will suffer the same for an indefinite time in the future; has undergone great physical pain and mental anguish and will undergo the same for an indefinite time in the future; has been obliged to and will have to continue to expend large sums of money in the future in an effort to effect a cure of his . . . injuries; and has been unable to attend his usual duties and

---

3. At oral argument, counsel for the Port Authority characterized Hess' injury as a mere "bruise." Transcript of Oral Argument (the "Oral Arg. Tr."), dated 15 December 1992, at 2-3. Counsel for Hess countered that the injury sustained was actually a "bone bruise." *Id.*

> occupation and will be unable to attend to the same for an indefinite time in the future, all to his great detriment and loss.

Id., ¶ 8.

Hess filed the Complaint on 31 May 1990, almost three years after the accident. Hess seeks damages "in excess of [f]ifty [t]housand [d]ollars pursuant to the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51 *et seq.* and the Boiler Inspection Act, 45 U.S.C. § 23. *Id.* ¶¶ 2, 12.

Discussion

The Port Authority seeks a dismissal of the Complaint on the ground that the Eleventh Amendment bars this suit because of Hess' failure to comply with the provisions on N.J.S.A. § 32:1-163. Moving Brief at 3. According to the Port Authority, this section requires suit against it to be filed within one year from the date of any alleged accident. *Id.*

The Port Authority argues that (1) it is an arm of the States of New York and New Jersey and, therefore, enjoys Eleventh Amendment immunity and (2) even though the Supreme Court has held that New York and New Jersey waived the Port Authority's Eleventh Amendment immunity when they respectively passed consent to suit statutes (the "Consent to Suit Statutes"), *see Feeney*, 495 U.S. at 308-09, that waiver was only in accordance with the statutory conditions to suit embodied in the Consent to Suit Statutes. Moving Brief at 3-7. Thus, because the Consent to Suit Statutes have a one-year limitations period, the Port Authority argues Hess' action is time-barred. *Id.* at 8.

Hess counters these arguments by contending that *Feeney*

stands for the proposition that the Port Authority has waived Eleventh Amendment Immunity entirely and that, in any event, the provisions of the Consent to Suit Statutes have no relevance to an action brought pursuant to FELA. Opp. Brief at 3-6. Hess cites *Hilton v. South Carolina Public Railways Comm'n*, ___ U.S. ___, 112 S.Ct. 560 (1991) as holding that "any sovereign immunity which may be held by state owned railroads under a state's common law has been abrogated by . . . FELA." Opp. Brief at 3. Thus, "pursuant to *Hilton*, [Hess] does not need any consent by [the Port Authority] to bring suit under . . . FELA." *Id.* Hess also argues that, even if the Consent to Suit Statutes are relevant to this case, the one year limitations period cannot supersede the three year limitations period provided by FELA. *Id.* at 6-8.

A. *Motion to Dismiss — Standard of Review*

On a motion brought pursuant to Federal Rule of Civil Procedure 12(b)(6), all allegations of the plaintiff must be taken as true and all reasonable factual inferences drawn in his or her favor. *Gomez v. Toledo*, 446 U.S. 635, 636 (1980); *Schrob v. Catterson*, 948 F.2d 1402, 1405 (3d Cir. 1991); *Unger v. National Residents Matching Program*, 928 F.2d 1392, 1395 (3d Cir. 1991); *Markowitz v. Northeast Land Co.*, 906 F.2d 100, 103 (3d Cir. 1990); *Melikian v. Corradetti*, 791 F.2d 274, 277 (3d Cir. 1986), *petition for cert. filed* 6 June 1990.

Nevertheless, legal conclusions made in the guise of factual allegations are not given the presumption of truthfulness. *See Papasan v. Allain*, 478 U.S. 265, 286 (1986); *Haase v. Webster*, 807 F.2d 208, 215 (D.C.Cir. 1986); *Briscoe v. LaHue*, 663 F.2d 713, 723 (7th Cir. 1981), *aff'd*, 460 U.S. 325 (1983); *Western Mining Council v. Watt*, 643 F.2d 618, 626 (9th Cir.), *cert. denied*, 454 U.S. 1031 (1981).

Accordingly, a court may dismiss a complaint for failure to state a claim when it appears beyond doubt that no relief could be granted under any set of facts which could be proved consistent with the allegations. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Unger*, 928 F.2d at 1395 (3d Cir); *Markowitz*, 906 F.2d at 103; *Ransom v. Marrazzo*, 848 F.2d 398, 401 (3d Cir. 1988). However, "a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46; *accord Cruz v. Beto*, 405 U.S. 319, 321 (1972); *Unger*, 928 F.2d at 1395; *Angelastro v. Prudential-Bache Secur., Inc.*, 764 F.2d 939, 944 (3d Cir.), *cert. denied*, 474 U.S. 935 (1985).

Additionally, the Supreme Court has stated that a federal court reviewing the sufficiency of the complaint has a limited role. "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support his claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *see also Estate of Bailey v. County of York*, 768 F.2d 503, 506 (3d Cir. 1985).

B. *Eleventh Amendment Immunity*

The Eleventh Amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI. Well established law governs application of the Eleventh Amendment. *Feeney*, 495 U.S. at 304. As the Supreme Court has recently stated:

> Since *Hans v. Louisiana*, 134 U.S. 1 (1890), we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it affirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereighty.

Blatchford v. Noatak, ___ U.S. ___, 111 S.Ct. 2578, 2581 (1991); *accord Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 472 (1987).

Stated differently, the Supreme Court "has drawn upon principles of sovereign immunity to construe the [Eleventh] Amendment to "establish that 'an unconsenting State is immune from suits brought in *federal* courts[4] by her own citizens as well as by citizens of another state.' " *Feeney*, 495 U.S. at 304 (quoting *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (quoting *Employees v. Dep't of Pub. Health & Welfare*, 411 U.S. 279, 280 (1980))) (emphasis added); *accord Welch*, 483 U.S. at 472.

The Eleventh Amendment bar to suit is not absolute.

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4. The Eleventh Amendment does not apply to suits brought in state court, which are instead controlled by common law principles of sovereign immunity. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 63-64 (1989); *Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980).

Blatchford, __U.S. at __, 111 S.Ct. at 2581; *Feeney*, 495 U.S. at 304. Two events may render the Eleventh Amendment inapplicable. First, in certain cases, Congress may abrogate a state's sovereign and/or Eleventh Amendment Immunity.[5] *Blatchford*, __U.S. at __ , 111 S.Ct. at 2581; *Feeney*, 495 U.S. at 304; *Dellmuth v. Muth*, 491 U.S. 223, 227 (1989). Second, states may consent to suit in federal court, in which case Eleventh Amendment immunity is waived. *Feeney*, 495 U.S. at 304; *Will*, 491 U.S. at 66; *Welch*, 483 U.S. at 473; *Pennhurst*, 465 U.S. at 99.

In the first instance, the Court has adopted "a particularly strict standard" to evaluate claims that Congress has abrogated a state's sovereign and Eleventh Amendment immunity. *Gregory*, __U.S. at __, 111 S.Ct. at 2401; *Feeney*, 495 U.S at 305; *Dellmuth*, 491 U.S. at 227-28. As the Court stated in *Dellmuth*:

> To temper Congress' acknowledged power of abrogation with due concern for the Eleventh Amendment's role as an essential component of our constitutional structure, we have applied a simple but stringent test: "Congress may abrogate the State's constitutionally secured immunity from suit in federal court only by making its intention *unmistakably clear in the*

5. Although generally the Eleventh Amendment prohibits even federal question cases against states in federal courts, *see Will*, 491 U.S. at 67 n.6; *Welch*, 483 U.S. at 482, Congress may abrogate the Eleventh Amendment in certain circumstances. Specifically, Congress retains the power to override state sovereign and Eleventh Amendment immunity in cases involving (1) rights protected by the Fourteenth Amendment and (2) the regulation of interstate commerce. *See, e.g., Gregory v. Ashcroft*, __U.S. __, 111 S.Ct. 2395, 2405-06 (1991); *Welch*, 483 U.S. at __; *Pennhurst*, 465 U.S. at 99; *Quern v. Jordan*, 440 U.S. 332, 344 (1979); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 484-85 (1976).

> *language of the statute.*" . . . Evidence of congressional intent must be both *unequivocal and textual.*[6]

491 U.S. at 227-28 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242, *reh'g denied*, 473 U.S. 926 (1985)) (emphasis added); *Welch*, 483 U.S. at 474; *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 16 (1981); *see also Gregory*, __ U.S. __, 111 S.Ct. at 2406 ("in the face of ambiguity, we will not attribute to Congress an intent to intrude on State government[] . . . regardless of whether Congress acted pursuant to its commerce clause power or § 5 of the Fourteenth Amendment"); *EEOC v. Wyoming*, 460 U.S. 226, 244 n.18 (1983) ("rule of statutory construction to be applied where statutory intent is ambiguous [is that] Congress must state its intent to impose mandatory obligations on the states"); *Quern*, 440 U.S. at 342-44 ("it is not easy to infer that Congress in lesislating pursuant to the Commerce Clause . . . desired silently to deprive the States of an immunity they have long enjoyed").

The Court has similarly employed a stringent standard to determine whether a state has waived Eleventh Amendment immunity. As stated in *Feeney*: "The Court will give effect to a State's waiver of Eleventh Amendment immunity 'only where stated by the *most express language* or by such *overwhelming implication* from the text as [will] leave no room for any other reasonable construction.' " 495 U.S. at 305 (quoting *Atascadero*,

6. As a result, the Court has held that a mere permissible inference of intent is not enough to justify a finding of abrogation. *Dellmuth*, 491 U.S. at 230. Similarly, a federal statute's general authorization for suit in federal court is "not the kind of unequivocal language sufficient to abrogate the Eleventh Amendment." *Welch*, 483 U.S. at 476; *accord Dellmuth*, 491 U.S. at 231; *Atascadero*, 473 U.S. at 246.

473 U.S at 239-40) (emphasis added); *see also Welch*, 483 U.S. at 473; *Edelman v. Jordan*, 415 U.S. 651, 673, *reh'g denied*, 416 U.S. 1000 (1974). A state does not waive its Eleventh Amendment immunity by consenting to suit only in its own courts.[7] *Feeney*, 495 U.S. at 306; *Florida Dep't of Health*, 450 U.S. at 150. For a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, "it must specify the State's intention to subject itself to suit in *federal* court." *Feeney*, 495 U.S. at 306 (quoting *Atascadero*, 473 U.S. at 241) (emphasis in original).

The Court has offered numerous rationale for these strict standards of interpretation. First, "abrogation of sovereign immunity upsets the "fundamental constitutional balance between the Federal Government and the States." *Feeney*, 495 U.S. at 305; *Dellmuth*, 491 U.S at 227; *Atascadero*, 473 U.S. at 238; *Pennhurst*, 465 U.S. at 100; *Hutto v. Feeney*, 437 U.S. 678, 691 (1978), *reh'g denied*, 439 U.S. 1122 (1979). The Court explained in *Pennhurst*:

> Our reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system. A state's constitutional interest in immunity encompasses not merely *whether* it can be sued, but *where* it may be sued. As

7. In other words, "a State's waiver of sovereign immunity in its own courts is not a waiver of Eleventh Amendment Immunity in the federal courts." *Pennhurst*, 465 U.S. at 99 n.9; *see also Welch*, 483 U.S. at 473-74; *Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 150, *reh'g denied*, 451 U.S. 933 (1981); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944).

> Justice Marshall well has noted "because of the problems of federalism inherent in making one sovereign appear against its will in the courts of the other, a restriction upon the exercise of federal judicial power has long been considered appropriate . . . ."

465 U.S. at 99-100 (quoting *Employees*, 411 U.S. at 294 (Marshall, J., concurring in result)) (emphasis in original). The Court has also recognized that a strict standard is required "because States are unable directly to remedy a judicial misinterpretation of . . . abrogation [or waiver]." *Feeney*, 495 U.S at 306.

C. *The Port Authority and Eleventh Amendment Immunity*

In a long line of cases, both Federal courts and the courts of New York and New Jersey have treated the Port Authority as a direct governmental agency of New York and New Jersey, vested with absolute immunity to suit. *See Trippe v. Port of New York Authority*, 14 N.Y.2d 119, 123 (1964); *Luciano v. Fanberg Realty Co.*, 102 A.D.2d 94, 95-96 (lst Dep't 1984) (citing cases); *Port of New York Authority v. Weehauken*, 27 N.J.Super 328, 333 (App.Div. 1953) (citing more cases), *rev'd on other grounds*, 14 N.J. 570 (1954). On two occasions, the Third Circuit has held that the Port Authority is entitled to Eleventh Amendment immunity.[8] *See Leadbeater v. Port Authority Trans-Hudson Corporation*, 873 F.2d 45, 47 (3d Cir. 1989), *vacated on other grounds sub nom., Benitez v. Port Authority Trans-Hudson Corp.*, 495 U.S. 926

8. The legislatures of both New York and New Jersey have expressly provided that PATH "shall have all of the privileges [and] immunities . . . of the Port Authority." N.J.S.A. § 32:1-35.61; N.Y. Unconsol. Laws § 6612. By virtue of these statutes, the Port Authority contends PATH enjoys Eleventh Amendment immunity

(cont'd)

(1990); *Port Authority Police Benev. Ass'n v. Port Authority of New York and New Jersey*, 819 F.2d 413, 414-18 (3d Cir.), *cert. denied*, 484 U.S. 953 (1987). *Cf. Mineo v. Port Authority of New York and New Jersey*, 779 F.2d 939, 949 (3d Cir. 1985) (holding that Port Authority should be treated as state for Tenth Amendment Purposes), *cert. denied*, 478 U.S. 1005 (1986).

The Supreme Court has assumed, without deciding, that the Port Authority is entitled to Eleventh Amendment immunity in order to address the question of whether such immunity was waived.[9] *Feeney*, 495 U.S. at 304-05. Consistent with this authority and given Hess' failure to contest the issue, a finding that both the Port Authority and PATH are vested with Eleventh Amendment immunity is appropriate.

In almost identical statutes, however, both New York and New Jersey have expressly consented to suit against the Port Authority. *Feeney*, 495 U.S. at 306; *see* N.J.S.A. § 32:1-157; N.Y. Unconsol. Laws § 7101. The relevant provision (the "Consent Provision") reads as follows:

> . . . [T]he states of New York and New Jersey consent to suits, actions or proceedings

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(cont'd)

to the same extent as the Port Authority. Moving Brief at 4. Hess does not contend otherwise; this contention is accepted. *See Leadbeater*, 873 F.2d at 47 (employing same approach).

9. Although the Supreme Court has not addressed this issue with regard to Port Authority, it has indicated that interstate agencies can qualify for Eleventh Amendment immunity. *See Lake County Estates. Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979).

> of any form or nature at law, in equity or otherwise (including proceedings to enforce arbitration agreements) against the Port Authority . . . and to appeals therefrom and reviews thereof . . . .

N.J.S.A. § 32:1-157; N.Y. Unconsol. Laws § 7101.

In *Feeney*, the Supreme Court examined the Consent to Suit Statutes. 495 U.S. at 306-09. Although the Court recognized that the Consent Provision did not unambiguously consent to jurisdiction in Federal court, the court found consent in the statutory venue provision (the "Venue Provision") contained in a later section of the Consent to Suit Statutes. The Court recognized that the Venue Provision was "suffic[ient] to resolve any ambiguity contained in the States' general consent to suit provision by expressly indicating that the States' consent to suit in [F]ederal court." *Id.* at 306-07. The Venue Provision states:

> The foregoing consent is granted upon the condition that venue in any suit, action or proceeding against the [P]ort [A]uthority shall be laid within a county or a judicial district, established by one of the said states *or by the United States*, and situated wholly or partially within the port of New York district.

N.J.S.A. § 32:1-162 (emphasis added); N.Y. Unconsol. Laws § 7106 (same).

Significantly, although the Venue Provision was contained in a different statutory section than the Consent Provision, reference to the Venue Provision was expressly found to be appropriate. The Court stated:

> Although one might not look first to a venue provision to find evidence of waiver of sovereign immunity, we believe that the [Venue P]rovision directly implicates the extent of the States' waiver embodied in the [C]onsent [P]rovision. The States' passed the [V]enue and [C]onsent to suit [P]rovisions as portions of the same Acts that set forth the nature, timing, and extent of the States' consent to suit. The [V]enue [P]rovision expressly refers to and qualifies the more general [C]onsent to suit [P]rovision.

Feeney, 495 U.S. at 307.

In addition to the Venue provision, New York and New Jersey have provided that consent to suit against the Port Authority is subject to a number of other conditions. For present purposes, the most significant condition is contained in the statutory provision which contains the limitations period for actions against the Port Authority. This provision (the "Limitations Provision") immediately follows the Venue Provision and states:

> The foregoing consent is granted upon the condition that any suit, action or proceeding prosecuted or maintained under this act shall be commenced within *one year* after the cause of action therefor shall have accrued. . . .

N.J.S.A. 5 § 32:1-163 (emphasis added); N.Y. Unconsol. Laws § 7107 (same).

Courts applying the Consent to Suit Statutes have indicated

that the one-year limitations period is to be strictly construed. *See Larson v. Port of New York Authority*, 17 F.R.D. 298, 299-300 (S.D.N.Y. 1955); *Rao v. Port of New York Authority*, 122 F.Supp. 595, 597 (E.D.N.Y. 1954), *aff'd*, 222 F.2d 363 (2d Cir. 1955); *De Luca v. New York City Transit Authority*, 119 Misc.2d 523, 464 N.Y.S.2d 341, 341 (Sup.Ct.N.Y.County 1983); *Matthews v. Port of New York Authority*, 163 N.J.Super. 83, 85 (Law.Div. 1978), *aff'd* 171 N.J.Super 38 (App.Div. 1979); *see also Luciano*, 102 A.D.2d at 96 ("waiver of immunity statutes must be strictly construed") (citing *Schillinger v. United States*, 155 U.S. 163, 166 (1894)); *Wood v. DIC/Underhill & Universal Builders Supply Co.*, 136 N.J. Super. 249, 252 (Law.Div. 1975) (same), *aff'd*, 144 N.J.Super. 364 (App.Div. 1976), *cert. denied*, 73 N.J. 65 (1977).

In fact, as these courts have explained, the Limitations Provision "is more than a statute of limitations in the usual sense." *DeLuca*, 464 N.Y.S.2d at 341; *accord Blazano v. Port of New York Authority*, 232 N.Y.S.2d 776, 778 (Sup.Ct. Kings County 1962), *aff'd*, 23 A.D.2d 573 (2d Dep't 1965). Rather, it is "an integral part of the right to enforce [an] action" against the Port Authority, *Blazano*, 232 N.Y.S.2d at 778, and it is "a condition precedent to bringing the action which must be pleaded." *DeLuca*, 464 N.Y.S.2d at 341; *Matthews*, 163 N.J.Super at 85; *Wood*, 136 N.J. Super at 252.

Because "[t]he liability and the remedy are created by and within the same statute, the limitations of the remedy [are] treated as limitations of the right." *Blazano*, 232 N.Y.S.2d at 778. For this reason, the one year limitations period is "not subject to the disabilities or excuses by which ordinary statutes of limitation may be avoided by a plaintiff." *Larson*, 17 F.R.D. at 300; *accord Blazano*, 232 N.Y.S.2d at 778 (citing numerous cases). Moreover, failure to comply with the one year limitations period results in a

jurisdictional defect requiring dismissal. *DeLuca*, 464 N.Y.S.2d at 341; *Matthews*, 163 N.J.Super. at 85; *Pinckney v. Jersey City*, 140 N.J.Super. 96, 100-103 (App.Div. 1976); *see also Welch*, 483 U.S. at 476 n.6 ("Eleventh Amendment immunity 'partakes of the nature of a jurisdictional bar' ") (quoting *Edelman*, 415 U.S. at 678).

D. *Merits of Motion to Dismiss*

The Port Authority argues that this action must be dismissed because Hess has failed bring suit within one year of the date on which his action accrued. Moving Brief at 8; Reply Brief at 5. This being the case, it is argued Hess has failed to satisfy a condition precedent to bringing suit against the Port Authority; whatever waiver may be present in the Consent to Suit Statutes has, according to the Port Authority, been negated. Moving Brief at 7-8; Reply Brief at 3. This argument is persuasive.

As previously indicated, the relinquishment of Eleventh Amendment rights cannot be lightly inferred and, indeed, will not be inferred unless a court finds waiver "by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction." *Edelman*, 415 U.S. at 673; *see also supra* at pp.10-12. As a state is under no obligation to waive its Eleventh Amendment immunity, it is axiomatic that a state may agree to waive its immunity only subject to certain conditions. *See Feeney*, 495 U.S. at 307; *Pennhurst*, 465 U.S. at 99; *Luciano*, 102 A.D.2d at 96; *see also Allendale Leasing, Inc. v. Stone*, 614 F.Supp. 1440, 1451 (D.R.I. 1985) (dismissing plaintiff's claims for falling outside scope of consent to suit statute), *aff'd*, 788 F.2d 830 (1st Cir. 1986).

As one court has stated, the "presumption that immunity has

not been waived surely applies to the *scope* of a State's consent to be sued as well as to the existence of consent in the first place." *Allendale*, 614 F.Supp. at 1451 (emphasis added). Moreover, as the court in *Luciano* stated: "[Because the] Port Authority, in the absence of consent, was absolutely immune from suit, the States were free to condition consent on compliance with whatever requirements they deemed appropriate." 102 A.D.2d at 96 (citing *Trippe*, 14 N.Y.2d at 123).

In this case, the Consent to Suit Statutes offer a broad but expressly conditional waiver of the Port Authority's Eleventh Amendment immunity. *See Rao*, 122 F.Supp. at 597 (conditions to suit against Authority are clear and unambiguous). Pursuant to the Venue Provision, "consent is granted *upon the condition*" that suit against the Port Authority be maintained in the state courts of New York and New Jersey or in the Federal courts within the port district of New York. N.J.S.A. § 32:1-162 (emphasis added); N.Y. Unconsol. Law § 7106 (same). Similarly, pursuant to the Limitation Provision, "consent is granted *upon the condition*" that suit must be brought within one year of accrual of the cause of action.[10] N.J.S.A. § 32:1-163 (emphasis added); N.Y. Unconsol. Law § 7107 (same).

By its holding in *Feeney*, the Supreme Court recognized the validity of the Port Authority's conditions to consent, as well as the integrated nature of the Consent to Suit Statutes. The Court, in giving effect to the Venue Provision, stated:

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10. Other statutory conditions to suit exist. *See, e.g.*, N.J.S.A. § 32:1-160 and N.Y. Unconsol. Law § 7104 ("consent does not extend to civil suits . . . for the recovery of statutory penalties"); N.J.S.A. § 32:1-161 and N.Y. Unconsol. Law § 7105 ("consent does not extend to suits . . . for judgments, orders or decrees restraining [or] enjoining . . . the Port Authority").

> We believe that the [Venue P]rovision directly indicates the *extent* of the States' waiver embodied in the [C]onsent [P]rovision. The States passed the [V]enue and [C]onsent to suit [P]rovisions as portions of the same Acts that set forth the nature, *timing*, and extent of the States' consent to suit.

Feeney, 495 U.S. at 307 (emphasis added). Implicit in the *Feeney* Court's statement is the recognition that no reason exists to distinguish between the Venue Provision and the Limitations Provision. The two provisions are contained in consecutive statutory sections; both contain the same conditional language; and both "refer[] to and qualif[y] the more general language" and scope of the Consent Provision. *Id.*

To apply the Venue Provision but not the Limitations Provision — as Hess suggests — would create an illogical and unfair result. On the one hand, Hess would benefit from the Venue Provision by being allowed to bring suit against the Port Authority in Federal Court. On the other hand, Hess would avoid the negative effect of the Limitations Provisions if his argument is accepted that the condition does not apply. Put simply, Hess cannot be allowed to pick and choose which conditions to suit against the Port Authority should apply, subject only to the criteria of whether the condition at issue is favorable to his case. It is an all or nothing proposition and, pursuant to *Feeney*, it appears that *all* conditions apply.

Case law construing the Consent to Suit Statutes further supports this position. As discussed above, the Consent to Suit Statutes in general, and the one-year limitations period in particular, have been strictly construed. *See Larson*, 17 F.R.D. at 299-300; *Rao*, 122 F.Supp. at 597; *DeLuca*, 464 N.Y.S.2d at 341;

Matthews, 163 N.J.Super. at 85; *see also Luciano*, 102 A.D.2d at 96 (waiver of immunity statutes must be strictly construed") (citing *Schillinger*, 155 U.S. at 166); *Wood*, 136 N.J.Super. at 252. As well, these courts have recognized that the Limitations Provision "is more than a statute of limitations in the usual sense." *DeLuca*, 464 N.Y.S.2d at 341; *see also Blazano*, 232 N.Y.S.2d at 778. It is both "an integral part of the right to enforce [an] action" against the Port Authority, *Blazano*, 232 N.Y.S.2d at 778, and "a condition precedent to bringing the action" in the first place. *DeLuca*, 464 N.Y.S.2d at 341; *Matthews*, 163 N.J.Super at 85; *Wood*, 136 N.J.Super at 252.

Although Hess presents numerous arguments to avoid application of the Limitations Provision and dismissal of this action, these arguments are without merit.

1. *Argument That The Port Authority Has Waived Its Eleventh Amendment Immunity In Its Entirely*

Hess argues that, pursuant to the Consent to Suit Statutes, the Port Authority has waived its Eleventh Amendment Immunity entirely. Opp. Brief at 6. According to Hess, this total waiver is necessitated by the holding in *Feeney*. Opp. Brief at 5-6. Hess concludes that "[t]he argued 'conditional waiver' of Eleventh Amendment immunity has no basis in law or in fact." *Id.* at 3.

Hess misconstrues both the holding in *Feeney* and the law generally with regard to waiver of Eleventh Amendment immunity. While *Feeney* did hold that, pursuant to the Venue Provision, the Port Authority had waived its right not to be sued in Federal Court, there was no suggestion in *Feeney* that the conditions accompanying that waiver were invalid. For instance, while *Feeney* indicated that the Port Authority can be sued in

Federal court, it neither stated nor implied that the Port Authority can be sued in *any* Federal Court.[11]

In fact, by giving positive effect to the express language of the Venue Provision, the Court, in effect, endorsed its conditions as well. This endorsement is implicit in the rationale of *Feeney*. As the discussion above indicates, *see supra* at pp.14-15, the *Feeney* Court expressly indicated that the Venue Provision was important because it "qualified the more general language" and scope of the Consent Provision. The Court also recognized that the Venue Provision was a proper place to turn for guidance because the Venue and Consent Provisions were both "portions of the same Acts that set forth the nature, *timing*, and extent of the States' consent to suit" against the Port Authority. *Feeney*, 495 U.S. at 307 (emphasis added).

In addition, even if it is conceded that *Feeney* was ambiguous with regard to the conditions expressed in the Consent to Suit Statutes, well-established case law in this area counsels against the broad reading of *Feeney* suggested by Hess.[12] As previously discussed, a stringent standard exists for finding waiver of Eleventh Amendment Immunity. In conjunction with this stringent standard, states may condition their consent. *See, e.g., Allendale*, 614 F.Supp. at 1451. As well, consent to suit statutes must be

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11. Significantly, *Feeney* was brought in a Federal judicial district which was proper under the Venue Provision. Under such circumstances, a finding of waiver was appropriate. Nevertheless, it does not follow that, if an action was instituted against the Port Authority in a Federal judicial district not covered by the Venue Provision, the Court in *Feeney* would have found a waiver under those circumstances as well.

12. The Court in *Feeney* recognized the constraining effect of this case law. *See* 495 U.S. at 304-07.

strictly construed. *Feeney*, 495 U.S. at 305-06; *Schillinger*, 155 U.S. at 166; *Luciano*, 102 A.D.2d at 96; *Wood*, 136 N.J.Super. at 252. In particular, courts have strictly construed the one year limitations period of the Consent To Suit Statutes. *See Larson*, 17 F.R.D. at 299-300; *Rao*, 122 F.Supp. at 597; *DeLuca*, 464 N.Y.S.2d at 341; *Matthews*, 163 N.J.Super. at 85.

For these reasons, the broad interpretation of *Feeney* suggested by Hess is rejected. In accordance with *Feeney* and the case law in this area, the Port Authority waived its Eleventh Amendment immunity subject, *inter alia*, to the conditions set forth in the Venue Provision and the Limitations Provision.

2. *Argument That Consent To Suit Statutes Are Not Needed To Obtain Subject Matter Jurisdiction Over The Port Authority In This Case*

Hess argues that, because he is "an employee covered by FELA," he "does not need the consent of [the Port Authority] to sue." Opp. Brief at 3-4. Hess also relies on *Hilton*, ___ U.S. ___, 112 S.Ct. 560, for the proposition that he "does not need any consent by [the Port Authority] to bring suit under the FELA." *Id.* According to Hess, the Supreme Court in *Hilton* "held that any sovereign immunity which may be held by state owned railroads under a state's common law has been abrogated by the enactment by Congress of FELA. The Court held that the entire federal scheme of railroad law applies to state owned railroads." *Id.* These arguments are without merit.

As discussed, a state or state agency can lose its Eleventh Amendment immunity in only two ways — either through Congressional abrogation or through a consent to suit statute. *See supra* at pp.8-9. Hess' argument ignores the fact the Supreme

Court has already held that FELA does not, by itself, contain the necessary explicit language to constitute an abrogation of Eleventh Amendment immunity. *See Feeney*, 495 U.S. at 305; *Welch*, 483 U.S. at 476-78. In *Welch*, the Court expressly reversed that portion of *Parden v. Terminal Ry. of Alabama State Docks Dep't*, 377 U.S. 184, *reh'g denied*, 377 U.S. 1010 (1964), which held that "Congress evidenced an intention to abrogate Eleventh Amendment immunity by making FELA applicable to 'every common carrier by railroad while engaging in commerce between any of the several states . . . .'"[13] *Welch*, 483 U.S. at 476 (quoting FELA, 45 U.S.C. § 51). The *Welch* Court further stated:

> Although our later decisions do not expressly overrule *Parden*, they leave no doubt that *Parden's* discussion of Congressional intent [in FELA] to negate the Eleventh Amendment is no longer good law. . . . Accordingly, to the extent that *Parden v. Terminal Railway, supra*, is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language, it is overruled.

Id. at 478; *see also Hilton*, ___ U.S. at ___, 112 S.Ct. at 562-63 (reaffirming *Welch*).

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13. In *Parden*, the Court was faced with an action for damages pursuant to FELA. 377 U.S. at 184-86. In *Welch*, although the court was concerned with a different statute — the Jones Act, 46 U.S.C. § 688(a) — the Court found *Parden* to be relevant because "the Jones Act applied the remedial provisions of FELA to seamen." 483 U.S. at 471; *see also Hilton*, ___ U.S. at ___, 112 S.Ct. at 562 (confirming relation between both statutes).

Review of the relevant portions of FELA does not evidence a Congressional intent to abrogate that is "both unequivocal and textual" and "unmistakably clear in the language of the statute." *Dellmuth*, 491 U.S. at 227-28 (quoting *Atascadero*, 473 U.S. at 242); *Welch*, 483 U.S. at 475; *Pennhurst*, 4514 U.S. at 16. The relevant portions of FELA read:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories . . . shall be liable in damages to any person suffering from injury while he is employed by such carrier in such commerce . . . for any such injury or death resulting . . . from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.

45 U.S.C. § 51.

> [A]n action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

Id., § 56.

Nothing in FELA indicates an unambiguous textual intent by Congress to abrogate Eleventh Amendment immunity. The Court has repeatedly recognized that general language authorizing suit in Federal court does not satisfy the stringent standard required to show abrogation. *See, e.g., Dellmuth*, 491 U.S. at 231; *Welch*, 483 U.S. at 476; *Atascadero*, 473 U.S. at 246; *Pennhurst*, 465 U.S. at 99. The Court stated in *Atascadero*:

> A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate Eleventh Amendment. When Congress chooses to subject the states to federal jurisdiction, it must do so specifically.

473 U.S. at 246.

Hess' reliance on *Hilton* is similarly unavailing. In *Hilton*, the Court held that the language of FELA unambiguously indicated an intent by Congress to subject state owned railroads to the statute's provisions. ___ U.S. at ___, 112 S.Ct. at 563-66. Therefore, the Court concluded that states and their agencies could be sued in state court for violations of FELA. *Id.* at 566.

As the Court recognized, however, *Hilton* did not disturb the Court's Eleventh Amendment jurisprudence. The Court in *Hilton* left *Welch* intact and specifically limited its holding to suits against states maintained in *state* courts. The Court stated:

> *Welch* is not controlling here . . . . [T]he most vital consideration of our decision today, which is that to confer immunity from *state-court* suit would strip all FELA and Jones Act

> protection from workers employed by the States, was not at all discussed in the *Welch* decision . . . . . [A]s we have stated on many occasions, the Eleventh Amendment does not apply in state courts.

Id. at ___, 112 S.Ct. at 564-65 (citing *Will*, 491 U.S. at 63; *Thiboutot*, 448 U.S. at 9 n.7; *Nevada v. Hall*, 440 U.S. 410, 420-21, *reh'g denied*, 441 U.S. 917 (1979)) (emphasis added).

The *Hilton* Court further recognized that "two separate inquiries into state liability" — Eleventh Amendment doctrine and statutory interpretation — must be made by courts. *Id.* at ___, 112 S.Ct. at 566. Although in some cases this two-fold inquiry may create a situation in which a Federal statute can only be enforced in state court, the Court recognized that "[s]ymmetry is not an imperative that must override just expectations which themselves rest upon the predictability and order of *stare decisis*." *Id.* This asymmetry, in fact, is based on the established precedent that a state may waive its sovereign immunity and consent to suit in state court while, nevertheless, maintaining its Eleventh Amendment Immunity.[14] *Feeney*, 495 U.S at 306; *Florida Dep't of Health*, 450 U.S. at 150.

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14. At oral argument, counsel for Hess stated that counsel for the Port Authority appeared to be confusing state Eleventh Amendment immunity and state sovereign immunity. Oral Arg. Tr. at 6. In fact, it appears counsel for Hess has confused the two immunities. For instance, the Opposition Brief states: "As [Port Authority] enjoys no *sovereign* immunity, even in the absence of a Consent to Su[it] Provision in its legislation, the limitations or conditions contained in the Consent to Su[it] have no bearing on this action." Opp. Brief at 3 (emphasis added). This argument fails to appreciate that (1) waiver of a state's sovereign immunity does not affect a state's ability to be sued in Federal court and (2) the Consent to Suit Statutes are the only means available to Hess to achieve subject matter jurisdiction over the Port Authority.

For these reasons, neither FELA nor *Hilton* provide relief for Hess. FELA does not abrogate Eleventh Amendment immunity, nor does *Hilton* address Eleventh Amendment immunity. Because the possibility of Congressional abrogation is closed to Hess, he has no choice except to rely on the Consent to Suit Statutes for this action. Therefore, his argument that the Consent to Suit Statutes need not be employed to maintain suit against the Port Authority is rejected.

3. *Argument That The One Year Limitations Period In The Consent To Suit Statutes Cannot Be Used To Alter FELA's Three Year Limitations Period*

The final argument offered by Hess is that the one year limitations period cannot be applied in this case. Opp. Brief at 7-8. Once again, Hess argues *Hilton* controls because it held "that the entire Federal scheme of railroad law as embodied in FELA governs the remedy of injured railroaders, not state statute or common law." *Id.* at 7. The inapplicability of *Hilton* to the issues in this case has been addressed immediately above, *see supra* at pp.26-28 and need not repeated. Put simply, *Hilton* authorizes the enforcement of FELA against states and their agencies in state, not Federal, courts.

Hess also argues:

> [I]f the limitation o[f] one year has any relevance to an FELA action, the explicit terms of the FELA render the limitations void. The FELA provides that no employer may promulgate or enforce any rule or procedure which reduces or limits an employee's rights under the FELA. 45 U.S.C. § 55. The one year limitations period is argued to reduce Hess' rights under the FELA and is therefore void.

Opp. Brief at 7. These arguments are also without merit.

Contrary to Hess' characterization, this is not a case in which state and Federal statutes of limitations are found to be in conflict. In such a case, there is no question that the Federal limitations period would prevail under the principles of Federal preemption as provided by the Supremacy Clause of the United States Constitution. *See* U.S. Const. Art. VI, ¶ 2. Instead, the one year limitations period applicable in this case "is more than a statute of limitations in the usual sense." *DeLuca*, 464 N.Y.S.2d at 341; *see also Blazano*, 232 N.Y.S.2d at 778. It is "an integral part of the right to enforce [an] action" against the Port Authority, *Blazano*, 232 N.Y.S.2d at 778, and "a condition precedent to bringing the action which must be pleaded." *DeLuca*, 464 N.Y.S.2d at 341; *Matthews*, 163 N.J.Super at 85; *Wood*, 136 N.J.Super at 252.

Because "[t]he liability and the remedy are created by and within the same statute, the limitations of the remedy [are] treated as limitations of the right." *Blazano*, 232 N.Y.S.2d at 778. For this reason, the one year limitations period is "not subject to the disabilities or excuses by which ordinary statutes of limitation may be avoided by a plaintiff." *Larson*, 17 F.R.D. at 300; *accord Blazano*, 232 N.Y.S.2d at 778 (citing numerous cases).

The distinction here is between a statute promulgated by a State legislature and "a rule of [C]onstitutional law, based on the Eleventh Amendment."[15] *Hilton*, ___ U.S. at ___; 112 S.Ct. at 565.

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15. Hess' argument that Section 55 of FELA prohibits application of the one year limitations period lacks merit. A rule of Constitutional law derived from the (cont'd)

Appendix C

While certainly the former would be preempted by a Federal statute, the latter cannot necessarily be so preempted. As the Court has recognized, a "state is not divested of its immunity 'on the mere ground that the case is one arising under the Constitution or laws of the United States.' " *Parden*, 377 U.S. at 186 (quoting *Hans*, 134 U.S. at 10).

As previously discussed, only a state's consent or Congressional abrogation can deprive a state of its Eleventh Amendment immunity. As also discussed, FELA does not meet the stringent standard established by the Supreme Court and does not abrogate state Eleventh Amendment immunity.[16] *See supra* at pp.24-26. For these reasons, Hess can only sue the Port Authority in Federal court under the conditions to consent provided by the Consent to Suit Statutes. As a condition to suit, the Statutes required Hess to bring suit within one year. Because he failed to comply with this condition, the Complaint must be dismissed.

(cont'd)
Eleventh Amendment is simply not "a rule or procedure" promulgated by an employer to reduce or limit an employee's right under FELA.

16. The Port Authority concedes that, if this action was brought in a New York or New Jersey state court, *Hilton* would require the three year statute of limitations to be applied. Oral Arg. Tr. at 3. This is logical because *Hilton* found state sovereign immunity — and, therefore, the conditions set forth in the Consent to Suit Statutes as they apply to state courts — to be abrogated by FELA.

Hess argues that this distinction creates an "absurd" situation. *Id.* at 5-6. In a FELA suit against the Port Authority, there would be a one year limitations period if it was brought in Federal court and a three year limitations period if it was brought in New York or New Jersey state court. *Id.* While this may be the case, the Court in *Hilton* recognized that Eleventh Amendment immunity and *stare decisis* take precedence over symmetry in the law. __ U.S. at __; 112 S.Ct. at 566.

Appendix C

Conclusion

For the reasons stated above, the Port Authority motion to dismiss is granted. An order accompanies this opinion.

s/Alfred J. Lechner, Jr.
ALFRED J. LECHNER, JR., U.S.D.J.

AJL:ljl
cc: Philip Selecky, Deputy Clerk

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED FEBRUARY 4, 1993

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 89-1991(WGB)

CHARLES F. WALSH,

Plaintiff,

v.

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Defendant.

ORDER

This matter having come before the Court on a motion by the defendant, the Port Authority Trans-Hudson Corporation, to dismiss the complaint for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1); and

For the reasons set forth in the Court's opinion filed this day; and

For good cause shown;

It is on this 4th day of February, 1993 ORDERED that the defendant's motion hereby GRANTED; and

It is further ORDERED that the complaint is dismissed.

s/ William G. Bassler
WILLIAM G. BASSLER, U.S.D.J.

APPENDIX E — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED FEBRUARY 4, 1993

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 89-1991(WGB)

CHARLES F. WALSH,

Plaintiff,

v.

PORT AUTHORITY TRANS-HUDSON CORPORATION,

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Defendant.

APPEARANCES:

Coffey & Kaye
By: Patrick T. Henigan, Esq.
718 Two Bala Plaza
Bala Cynwyd, Pa. 19004
Attorney for the Plaintiff

Donald Burke, Esq.
Hugh H. Welsh, Esq.
One Riverfront Plaza
Suite 327
Newark, N.J. 07102
Attorneys for the Defendant

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OPINION

BASSLER, DISTRICT JUDGE:

The defendant, the Port Authority Trans-Hudson Corporation, ["PATH"] moves to dismiss the complaint for lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). For the following reasons, the Court grants the motion and dismisses the complaint.

I. BACKGROUND

The plaintiff, Charles F. Walsh, filed suit in this Court on May 9, 1989 under the Federal Employers Liability Act, ["FELA"] 45 U.S.C. § 51 et seq. Walsh alleges that the negligence of PATH and its agents on Oct. 6, 1986 resulted in a passenger train door slamming into his right wrist and arm, seriously injuring him. Walsh worked for PATH at the time.

The Port Authority of New York and New Jersey ["the Port Authority"] is an agency of the states of New York and New Jersey, created by a bistate compact which was ratified by Congress. 42 Stat. 174 (1921). The defendant, PATH, is a regional rail commuter system operated as a wholly-owned subsidiary of the Port Authority. PATH is subject to suit to the same extent as the Port Authority. *See* N.J. Stat. Ann. § 32:1-35.61 (West 1990); N.Y. Unconsol. Law § 6612 (McKinney 1979).

II. DISCUSSION

This motion turns on whether Walsh's complaint, which was filed more than two years after the alleged negligent conduct, is barred by the one-year limitation provision in the Port Authority's consent-to-suit statutes and the Eleventh Amendment to the United States Constitution. Walsh argues that the three-year limitation period under FELA applies.

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The Eleventh Amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or Citzens or Subjects of any Foreign State.

The United States Supreme Court, drawing upon principles of sovereign immunity, has construed the amendment to "establish that 'an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state.' " *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 100 (1984)(quoting *Employees v. Missouri Dept. of Public Health and Welfare*, 411 U.S. 279, 280 (1973)).

The Eleventh Amendment may bar a suit even though a state is not named as a party to the action, provided the state is the real party in interest. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). The Third Circuit has held that the Port Authority is considered a state agency entitled to Eleventh Amendment immunity. *Port Authority Police Benevolent Assoc. v. Port Authority of New York and New Jersey*, 819 F.2d 413, 415 (3d Cir.), *cert. denied*, 484 U.S. 953 (1987); *but see Feeney v. Port Authority Trans-Hudson Corp.*, 873 F.2d 628, 630 (2d Cir. 1989), *aff'd on other grounds*, 495 U.S. 299 (1990) (holding that the Port Authority is *not* a state agency for Eleventh Amendment purposes).

This circuit has also held that PATH, the Port Authority's wholly owned subsidiary, is also a state agency. *Leadbeater v. Port Authority Trans-Hudson Corp.*, 873 F.2d 45, (3d Cir. 1989), *vacated on other grounds*, 495 U.S. 926 (1990). Therefore, PATH

is entitled to immunity under the Eleventh Amendment, unless one of the two narrow exceptions to the coverage of the amendment applies.

Under the first exception, a state may waive its immunity and consent to be sued in federal court. *See Clark v. Barnard*, 108 U.S. 436, 447 (1883). Second, Congress may abrogate this immunity, without the states' consent, when it acts under Section 5 of the Fourteenth Amendment "to enforce, by appropriate legislation" the substantive provisions of that amendment. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). The United States Supreme Court has also indicated that Congress' authority to abrogate the states' immunity extends, to a limited extent, beyond Section 5 of the Fourteenth Amendment. *See County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 252 (1985).

Walsh argues that both exceptions apply here. He asserts that the states of New York and New Jersey have completely waived their sovereign immunity concerning PATH. Furthermore, he asserts that Congress, in enacting FELA, abrogated the Eleventh Amendment immunity for state agencies sued under that remedial statute.

The Court concludes that PATH has only partially, and not completely, waived its sovereign immunity under the Eleventh Amendment. The legislatures of New York and New Jersey have imposed statutory conditions to suit. *See* N.J.S.A. 32:1-163; N.Y. Unconsol. Law § 7107 (McKinney 1979). Both states have imposed a one-year limitation period in which to sue the Port Authority or its subsidiaries. *Id.*

Walsh cites *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990) for the proposition that PATH has waived *all*

Eleventh Amendment immunity to suit. The Court finds that the decision does not sweep that broadly. In *Feeney*, the United States Supreme Court found that the venue provision in the Port Authority consent-to-sue statutes of New York and New Jersey, by mentioning "judicial district[s]," demonstrated the states' consent to suit in federal court. *Id.* at 307.

The Supreme Court, however, noted that New York and New Jersey did not give unlimited consent to suit:

> Although one might not look first to a venue provision to find evidence of waiver of sovereign immunity, we believe that the provision directly indicates the extent of the States' waiver embodied in the consent provision. The States passed the venue and consent to suit provisions as portions of the same Acts that set forth the nature, timing and extent of the States' consent to suit.

Id. Contrary to what Walsh's argument implies, a state need not make waiver of Eleventh Amendment immunity an all-or-nothing proposition. It may impose conditions on such a waiver. *See Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89, 99 (1984)(state's interest in Eleventh Amendment immunity extends not only to whether it may be sued, but where it may be sued). New York and New Jersey have imposed such conditions here. Walsh's Congressional abrogation argument also lacks merit. The United States Supreme Court, in *Welch v. Texas Dept. of Highways & Public Transp.*, 483 U.S. 468, 476-78 (1987), expressly held that FELA and its maritime counterpart, the Jones Act, 46 U.S.C. § 688, did not abrogate the states' Eleventh Amendment immunity.

In support of his position that, by enacting FELA, Congress

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has abrogated PATH's sovereign immunity. Walsh relies on *Hilton v. South Carolina Public Ry. Comm.*, 112 S. Ct. 560 (1991), which held that FELA created a cause of action against a state-owned railroad in state court.

But the teaching of *Hilton* is inapposite here, since that case was on appeal from the South Carolina Supreme Court and, therefore, did not involve the Eleventh Amendment, which applies only to suits in federal court.

In fashioning a rule of constitutional law based on the Eleventh Amendment, the United States Supreme Court in *Welsh* stated that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court *only* by making its intention unmistakably clear in the language of the statute." 483 U.S. at 471 (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) (emphasis added). And in *Hilton*, the Supreme Court acknowledged that it had decided in *Welch* that FELA's language, for Eleventh Amendment purposes, does not amount to a clear statement of Congress' intent to abrogate state sovereign immunity. 112 S. Ct. at 565, 567.

In short, PATH is entitled to protection under the Eleventh Amendment and has consented to suit only within the statutorily imposed period of one year. Having failed to file suit within a year of the allegedly negligent conduct, Walsh has failed to meet that condition. Therefore, the Eleventh Amendment bars his claim.

III. CONCLUSION

For the reasons discussed above, the Court grants PATH's motion and dismisses the complaint for lack of subject matter jurisdiction under Rule 12(b)(1). An appropriate order follows.

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Dated: February 4, 1993

s/ William G. Bassler
WILLIAM G. BASSLER, U.S.D.J.

APPENDIX F — SUR PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED OCTOBER 27, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 93-5051;and 93-5149

ALBERT HESS, Appellant in No. 93-5051

CHARLES F. WALSH, Appellant in No. 93-5149

v.

PORT AUTHORITY TRANS-HUDSON CORPORATION (PATH)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, and LEWIS, *Circuit Judges*

The petition for rehearing filed by appellants in the above-entitled cases having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

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By the Court,
s/ Judge Stapleton
Circuit Judge

Dated : October 27, 1993

APPENDIX G — RELEVANT STATUTES INVOLVED

45 U.S.C. § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

(Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.)

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45 U.S.C. § 56. Actions; limitations; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless comenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

(Apr. 22, 1908, c. 149, § 6, 35 Stat. 66; Apr. 5, 1910, c. 143, § 1, 36 Stat. 291; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, § 2, 53 Stat. 1404; June 25, 1948, c. 646, § 18, 62 Stat. 989.)

§ 6404. Port Authority of New York and New Jersey created

ARTICLE III

There is hereby created "The Port of New York Authority" (for brevity hereinafter referred to as the "Port Authority"), which shall be a body corporate and politic, having the powers and jurisdiction hereinafter enumerated, and such other and additional powers as shall be conferred upon it by the legislature of either state concurred in by the legislature of the other, or by act or acts of congress, as hereinafter provided. On and after July first, nineteen hundred seventy-two, the port authority shall be known and designated as "The Port Authority of New York and New Jersey."

L.1921, c. 154, § 1 (pt.); amended L.1972, c. 531, § 1.

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§ 6406. Board of commissioners; by-laws

ARTICLE V

The commissioners shall, for the purpose of doing business, constitute a board and may adopt suitable by-laws for its management.

L.1921, c. 154, § 1 (pt.).

§ 6407. Powers of port authority; comprehensive plan for development of port

ARTICLE VI

The port authority shall constitute a body, both corporate and politic, with full power and authority to purchase, construct, lease and/or operate any terminal or transportation facility within said district; and to make charges for the use thereof:[1] and for any of such purposes to own, hold, lease and/or operate real or personal property, to borrow money and secure the same by bonds or by mortgages upon any property held or to be held by it. No property now or hereafter vested in or held by either state, or by any county, city, borough, village, township or other municipality, shall be taken by the port authority, without the authority or consent of such state, county, city, borough, village, township or other municipality, nor shall anything herein impair or invalidate in any way any bonded indebtedness of such state, county, city, borough, village, township or other municipality, nor impair the provisions of law regulating the payment into sinking funds of revenues derived from municipal property, or dedicating the revenues derived from any municipal property to a specific purpose.

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The powers granted in this article[2] shall not be exercised by the port authority until the legislatures of both states shall have approved of a comprehensive plan for the development of the port as hereinafter provided.

L.1921, c. 154, § 1 (pt.).

§ 6408. Additional powers; reports; pledging of credit

ARTICLE VII

The port authority shall have such additional powers and duties as may hereafter be delegated to or imposed upon it from time to time by the action of the legislature of either state concurred in by the legislature of the other. Unless and until otherwise provided, it shall make an annual report to the legislature of both states, setting forth in detail the operations and transactions conducted by it pursuant to this agreement and any legislation thereunder. The port authority shall not pledge the credit of either state except by and with the authority of the legislature thereof.

L.1921, c. 154, § 1 (pt.).

§ 6415. Chairman; officers and employees

ARTICLE XIV

The port authority shall elect from its number a chairman, vice-chairman, and may appoint such officers and employees as it may require for the performance of its duties, and shall fix and determine their qualifications and duties.

L.1921, c. 154, § 1 (pt.).

§ 6416. Appropriations for expenses

ARTICLE XV

Unless and until the revenues from operations conducted by the port authority are adequate to meet all expenditures, the legislatures of the two states shall appropriate, in equal amounts, annually, for the salaries, office and other administrative expenses, such sum or sums as shall be recommended by the port authority and approved by the governors of the two states, but each state obligates itself hereunder only to the extent of one hundred thousand dollars in any one year.

L.1921, c. 154, § 1 (pt.).

§ 6419. Rules and regulations

ARTICLE XVIII

The port authority is hereby authorized to make suitable rules and regulations not inconsistent with the constitution of the United States or of either state, and subject to the exercise of the power of congress, for the improvement of the conduct of navigation and commerce, which, when concurred in or authorized by the legislatures of both states, shall be binding and effective upon all persons and corporations affected thereby.

L.1921, c. 154, § 1 (pt.).

§ 6459. Powers of port authority and municipalities in executing plan; securities tax exempt; limitations

The port of New York authority [FN1MV] is hereby authorized and directed to proceed with the development of the port of New York in accordance with said comprehensive plan as rapidly as may be economically practicable and is hereby vested with all necessary and appropriate powers not inconsistent with the constitution of the United States or of either state, to effectuate the same, except the power to levy taxes or assessments. It shall request the congress of the United States to make such appropriations for deepening and widening channels and to make such grants of power as will enable the said plan to be effectuated. It shall have power to apply to all federal agencies, including the interstate commerce commission, the war department, and the United States shipping board, for suitable assistance in carrying out said plan. It shall cooperate with the state highway commissioners of each state so that trunk line highways as and when laid out by each state shall fit in with said comprehensive plan. It shall render such advice, suggestion and assistance to all municipal officials as will permit all local and municipal port and harbor improvements, so far as practicable, to fit in with said plan. All municipalities within the district are hereby authorized and empowered to cooperate in the effectuation of said plan, and are hereby vested with such powers as may be appropriate or necessary so to cooperate. The bonds or other securities issued by the port authority shall at all times be free from taxation by either state. The port authority shall be regarded as the municipal corporate instrumentality of the two states for the purpose of developing the port and effectuating the pledge of the states in the said compact, but it shall have no power to pledge the credit of either state or to impose any obligation upon either state, or upon any municipality, except as and when such power is expressly

granted by statute, or the consent by any such municipality is given.

§ 6466. Actions to enforce laws and orders; jurisdiction of courts

Whenever the port authority shall be of the opinion that any person, association or corporation subject to its jurisdiction is failing or omitting, or about to fail or omit to do anything required of it by the laws governing the development and regulation of the port of New York, or by its order, or is doing or is about to do anything, or permitting, or about to permit anything to be done contrary to, or in violation of, such law or orders, it shall direct its legal representative to commence an action or proceeding in the name of the port authority, in an appropriate court having jurisdiction, for the purpose of having such violations, or threatened violations, stopped and prevented either by mandamus or injunction. Such an action or proceeding may be brought in the supreme court of this state, and the said court shall have and is hereby given the necessary and appropriate jurisdiction to grant mandamus or injunction, as the case may require, or any other relief appropriate to the case.

Failure of such person, association or corporation to notify the port authority, as required in the preceding section, of its acceptance of and willingness to obey any order of the port authority shall be and be deemed to be prima facie proof that such person, association or corporation is guilty of such violation, or threatened violation. The legal representative of the port authority shall begin such action or proceeding by a petition to the appropriate court, alleging the violation complained of and praying for appropriate relief by way of mandamus or injunction. If the petition is directed to a court of this state, it shall thereupon be

the duty of the court to specify the time, not exceeding twenty days after the service of a copy of the petition, within which the person, association or corporation complained of must answer the petition. In case of default in answer, or after answer, the court shall immediately inquire into the facts and circumstances, in such manner as the court shall direct, without other or formal pleadings and without respect to any technical requirement. Such other persons, associations or corporations as the court shall deem necessary or proper to join as parties, in order to make its order, judgment or writs effective, may be joined as parties upon application of the legal representative of the port authority. The final judgment in any such action or proceeding shall either dismiss the action or proceeding, or direct that a writ of mandamus, or an injunction, or both, issue as prayed for in the petition, or in such modified or other form as the court may determine will afford the appropriate relief.

§ 6612. General powers; local laws; subsidiary corporation

All details of the effectuation, including but not limited to details of financing, leasing, rentals, tolls, fares, fees and other charges, rates, contracts and service, of the world trade center, the Hudson tubes and the Hudson tubes extensions by the port authority shall be within its sole discretion and its decision in connection with any and all matters concerning the world trade center, the Hudson tubes and the Hudson tubes extensions shall be controlling and conclusive. The local laws, resolutions, ordinances, rules and regulations of the city of New York shall apply to such world trade center if so provided in any agreement between the port authority and the city and to the extent provided in any such agreement.

So long as any facility constituting a portion of the port

development project shall be owned, controlled or operated by the port authority (either directly or through a subsidiary corporation incorporated for any of the purposes of this act [FN1MV]), no agency, commission or municipality of either or both of the two states shall have jurisdiction over such facility nor shall any such agency, commission or municipality have any jurisdiction over the terms or method of effectuation of all or any portion thereof by the port authority (or such subsidiary corporation) including but not limited to the transfer of all or any portion thereof to or by the port authority (or such subsidiary corporation).

Nothing in this act shall be deemed to prevent the port authority from establishing, acquiring, owning, leasing, constructing, effectuating, developing, maintaining, operating, rehabilitating or improving all or any portion of the port development project through wholly owned subsidiary corporations of the port authority or from transferring to or from any such corporations any moneys, real property or other property for any of the purposes of this act. If the port authority shall determine from time to time to form such a subsidiary corporation it shall do so by executing and filing with the secretary of state of New York and the secretary of state of New Jersey a certificate of incorporation, which may be amended from time to time by similar filing, which shall set forth the name of such subsidiary corporation, its duration, the location of its principal office, and the purposes of the incorporation which shall be one or more of the purposes of establishing, acquiring, owning, leasing, constructing, effectuating, developing, maintaining, operating, rehabilitating or improving all or any portion of the port development project. The directors of such subsidiary corporation shall be the same persons holding the offices of commissioners of the port authority. Such subsidiary corporation shall have all the powers vested in the port authority itself for the purposes of this act except that it shall not

have the power to contract indebtedness. Such subsidiary corporation and any of its property, functions and activities shall have all of the privileges, immunities, tax exemptions and other exemptions of the port authority and of the port authority's property, functions and activities. Such subsidiary corporation shall be subject to the restrictions and limitations to which the port authority may be subject, including, but not limited to the requirement that no action taken at any meeting of the board of directors of such subsidiary corporation shall have force or effect until the governors of the two states shall have an opportunity, in the same manner and within the same time as now or hereafter provided by law for approval or veto of actions taken at any meeting of the port authority itself, to approve or veto such action. Such subsidiary corporation shall be subject to suit in accordance with section nine of this act [FN2MV] and chapter three hundred one of the laws of New York of nineteen hundred fifty [FN3MV] and chapter two hundred four of the laws of New Jersey of nineteen hundred fifty-one [FN4MV] as if such subsidiary corporation were the port authority itself. Such subsidiary corporation shall not be a participating employer under the New York retirement and social security law or any similar law of either state and the employees of any such subsidiary corporation, except those who are also employees of the port authority, shall not be deemed employees of the port authority.

Whenever any state, municipality, commission, agency, officer, department, board or division is authorized and empowered for any of the purposes of this act to co-operate and enter into agreements with the port authority or to grant any consent to the port authority or to grant, convey, lease or otherwise transfer any property to the port authority or to execute any document, such state, municipality, commission, agency, officer, department, board or division shall have the same authorization and power for any of such purposes to co- operate and enter into

agreements with such subsidiary corporation and to grant consents to such subsidiary corporation and to grant, convey, lease or otherwise transfer property to such subsidiary corporation and to execute documents for such subsidiary corporation.

§ 6951. Sale of real property, manner of procedure

Whenever The Port of New York Authority [FN1MV] (hereinafter called the Port Authority) shall determine to sell any real property which may have been acquired by the Port Authority by purchase, condemnation or otherwise, pursuant to any of its powers and authorities, but which real property is no longer required for such purposes, the following procedure shall be followed:

(a) A map shall be made of such real property so determined as no longer required, which map shall be filed in the office of the Port Authority.

(b) There shall be annexed to such map a certificate executed by the chief engineer of the Port Authority stating that such real property is no longer required for such purposes.

(c) All or any portion of said real property may be sold at either private or public sale, and all deeds of conveyance therefor shall be by bargain and sale and shall be executed by the chairman, or the vice chairman, or the general manager, or an assistant general manager of the Port Authority and attested by the secretary thereof.

§ 7002. Establishment of general reserve fund

In all cases where the port authority has raised or shall

hereafter raise moneys for the establishment, acquisition, construction or effectuation of terminal and/or transportation facilities by the issue and sale of bonds legal for investment, as herein defined and limited, the surplus revenues received by or accruing to the port authority from or in connection with the operation of such terminal and/or transportation facilities built in whole or in part by the proceeds of the sale of such bonds shall be pooled and applied by it to the establishment and maintenance of a general reserve fund in an amount equal to one-tenth (1/10) of the par value of all bonds legal for investment, as herein defined and limited, issued by the port authority and currently outstanding. The moneys in the said general reserve fund may be pledged in whole or in part by the port authority as security for or applied by it to the repayment with interest of any moneys which it has raised or may hereafter raise upon any bonds, legal for investment, as herein defined and limited, and made and issued by it for any of its lawful purposes; and the said moneys may be applied by the port authority to the fulfillment of any other undertakings which it has assumed or may or shall hereafter assume to or for the benefit of the holders of any of such bonds.

Any surplus revenues not required for the establishment and maintenance of the aforesaid general reserve fund shall be used for such purposes as may hereafter be directed by the two said states.

§ 7053. Bonds as direct obligation of authority; security for payment; terms and conditions; redemption

The bonds delivered to the two states pursuant to this act [FN1MV] and the concurrent act of the state of New Jersey [FN2MV] shall be direct and general obligations of the port authority, and its full faith and credit shall be pledged for the prompt payment of the principal and interest thereof. The payment

of the principal and interest thereof shall be secured by the general reserve fund of the port authority, authorized by chapter forty-eight of the laws of New York of nineteen hundred and thirty-one [FN3MV] and chapter five of the laws of New Jersey of nineteen hundred and thirty-one; [FN4MV] and said general reserve fund shall be pledged as security for the payment of the principal and interest of said bonds and for the fulfillment of other undertakings assumed by the port authority to or for the benefit of the holders of said bonds. Such pledge, however, shall be subject to the right of the port authority to pledge said general reserve fund as security for any other bonds, notes or evidences of indebtedness whatsoever hereafter issued by the authority as security for which it may at the time be authorized to pledge the said general reserve fund, and also subject to the right of the port authority to use the moneys in said general reserve fund to meet, pay or otherwise fulfill any of its obligations under or in connection with any bonds, notes or other evidences of indebtedness as security for which said general reserve fund has heretofore been or is now pledged or for which said general reserve fund may hereafter be pledged. Moreover, no greater rights in or to said general reserve fund shall be granted to or conferred upon the holders of the bonds delivered to the two states pursuant to this act and the concurrent act of the state of New Jersey than have been granted to and conferred upon the holders of general and refunding bonds of the port authority issued pursuant to the resolution of the port authority adopted March eighteenth, nineteen hundred and thirty-five, and amended March twenty-fifth, nineteen hundred and thirty-five and September sixteenth, nineteen hundred and forty-three.

The bonds delivered to the two states pursuant to this act and the concurrent act of the state of New Jersey shall be dated as of a date not more than thirty days subsequent to the date on which delivery is made or tendered, shall mature forty years from their date, and shall bear interest at the rate of one and one-half per

centum per annum. Said bonds shall be subject to redemption at the option of the port authority, in whole or in part, on any interest payment date or dates at one hundred percent of their par value, plus accrued interest to the date set for redemption.

Except as hereinbefore specifically provided, the port authority shall, by resolution, determine the form, characteristics and all other matters in connection with said bonds, including without limiting the generality hereof, the denominations in which they shall be issued, provisions with respect to the exchange of bonds of one denomination into bonds of another denomination, provisions with respect to the issuance of temporary bonds and the exchange thereof for definitive bonds, provisions with respect to the establishment of a sinking fund or sinking funds and for the use of the moneys in sinking fund to purchase or redeem bonds prior to their maturity, provisions with respect to the place of payment, provisions with respect to notice of redemption, provisions with respect to the paying agent or the registrar and provisions with respect to the method of signature.

§ 7101. Consent to suits against the Port Authority

Upon the concurrence of the state of New Jersey in accordance with section twelve[1] hereof, the states of New York and New Jersey consent to suits, actions or proceedings of any form or nature at law, in equity or otherwise (including proceedings to enforce arbitration agreements) against the Port of New York Authority[2] (hereinafter referred to as the "Port Authority"), and to appeals therefrom and reviews thereof, except as hereinafter provided in sections two through five,[3] inclusive, hereof.

L.1950, c. 301, § 1.

Appendix G

§ 7106. Venue of action; consent to liability for tortious acts

The foregoing consent is granted upon the condition that venue in any suit, action or proceeding against the port authority shall be laid within a county or a judicial district, established by one of said states or by the United States, and situated wholly or partially within the port of New York district. The port authority shall be deemed to be a resident of each such county or judicial district for the purpose of such suits, actions or proceedings. Although the port authority is engaged in the performance of governmental functions, the said two states consent to liability on the part of the port authority in such suits, actions or proceedings for tortious acts committed by it and its agents to the same extent as though it were a private corporation.

L.1950, c. 301, § 6.

APPENDIX H — EXCERPTS OF PAGES FROM "THE PORT AUTHORITY OF NY & NJ - COMPREHENSIVE ANNUAL FINANCIAL REPORT FOR THE YEAR ENDED DECEMBER 31, 1991"

THE PORT AUTHORITY OF NY & NJ
One World Trade Center
New York, N.Y. 10048
(212) 435-7000
(202) 961-6600

Reporting Entity and its Services

The Port Authority of New York and New Jersey is a municipal corporate instrumentality and political subdivision of the States of New York and New Jersey, created in 1921 by Compact between the two States and thereafter consented to by the Congress of the United States, which undertakes only those projects authorized by the two States. It is authorized and directed to plan, develop, and operate terminals and other facilities of transportation and commerce, and to advance projects in the general fields of transportation, economic development, and world trade that contribute to promoting and protecting the commerce and economy of the Port District, which comprises an area of about 1,500 square miles in both States centering about New York Harbor.

The Governor of each State appoints six of the twelve members of the governing Board of Commissioners, subject to confirmation by the respective State Senate. The Commissioners serve six-year overlapping terms as public officials without compensation. They establish Port Authority policy and appoint an Executive Director to implement it, and also appoint a General Counsel to act as legal advisor to the Board and to the Executive Director. Governors from either State have from time to time

exercised their statutory power to review and to veto the actions of Commissioners from their respective State.

The Executive Director is responsible for the management of the daily operations of the agency's 39 facilities through line and staff departments and guides proposals to the point of presentation to the Board of Commissioners. The Executive Director is also responsible for implementing such proposals after presentation to and approval by the Board.

As a public corporation serving the people of the New York-New Jersey metropolitan region, the Port Authority combines sound business and governmental principles and practices and is dedicated to providing high quality public service and operating efficiency. To assist in guiding the operation of each of the departments, detailed policies and procedures are published and communicated to employees.

The Compact envisions the Port Authority as being financially self-sustaining and, as such, it must raise the funds necessary for the construction or acquisition of facilities upon the basis of its own credit. The agency has neither the power to pledge the credit of either State or any municipality nor to levy taxes or assessments.

Results of Operations

Gross operating revenues totalled $1,856,895,000 in 1991, an increase of $166,165,000 or 9.8% over 1990. This growth is primarily attributable to the effect of the 1991 toll increase, the first full year of operations of the Essex County Resource Recovery Facility, and higher flight fees due to the recovery of higher costs at all the airports. Operating expenses totalled $1,337,406,000 in 1991, an increase of $55,108,000 or 4.3% over 1990, mainly

reflecting the full year of operations of the Essex County Resource Recovery Facility, and higher bad debt expense.

Portfolio Management

The Port Authority's long-term investments are in securities of or guaranteed by the United States Government and in Port Authority bonds. Earnings of $47,165,000 on long-term investments were recorded pursuant to Port Authority bond resolutions.

Short-term investments consisted primarily of United States Government securities (including such securities held pursuant to repurchase agreements), securities of United States Government Agencies and in limited amounts of commercial paper. In addition, short-term investments were also made, in connection with certain interest rate exchange contracts, with investment firms and banking institutions and, in connection with certain interest rate options contracts, with primary dealers in United States Treasury securities. Earnings on short-term investments pursuant to Port Authority bond resolutions totalled $27,649,000, which includes approximately $6,000,000 of earnings distributed to capital.

Combined earnings on such long-term and short-term investments decreased from 1990 by approximately 4.9%, primarily due to a declining interest rate environment.

The balance of financial income credited to operations pursuant to Port Authority bond resolutions consists principally of interest on loans in connection with the Essex County Resource Recovery Facility and conditional installment sales of office units at the Newark Legal and Communications Center.

Appendix H

Risk Management

The Port Authority presently carries insurance or requires such insurance to be carried upon all of its facilities now in operation against direct physical loss or damage and loss of revenue resulting therefrom, in such amounts, with such deductibles or exceptions, with such exclusions of portions of facilities, and against such hazards, if available, as it deems appropriate. The Port Authority also carries excess public liability insurance in connection with all of its facilities against such hazards, and in such amounts, if available, as it deems appropriate. The Port Authority provides for uninsured potential losses through its self-insurance program by appropriation from the Consolidated Bond Reserve Fund to the Operating Fund and provides for losses by charging operating expenses as incurred.

Notes to Consolidated Financial Statements

Note A-Summary of Significant Accounting Policies:

1. The Port Authority of New York and New Jersey, created in 1921 by Compact between the two States and thereafter consented to by the Congress of the United States, has no stockholders or equity holders; cash derived from operations and other cash received must be disbursed for specific purposes in accordance with provisions of various statutes and agreements with holders of its obligations and others. The costs of providing facilities and services to the general public on a continuing basis are recovered primarily in the form of tolls, fares, fees, rentals and other user charges.

Appendix H

Note E - Financing:

1. The Port Authority finances construction and acquisition of its facilities primarily by issuing bonds, notes and other obligations and through application of its reserve funds. Details of outstanding obligations are described in Note D.